



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

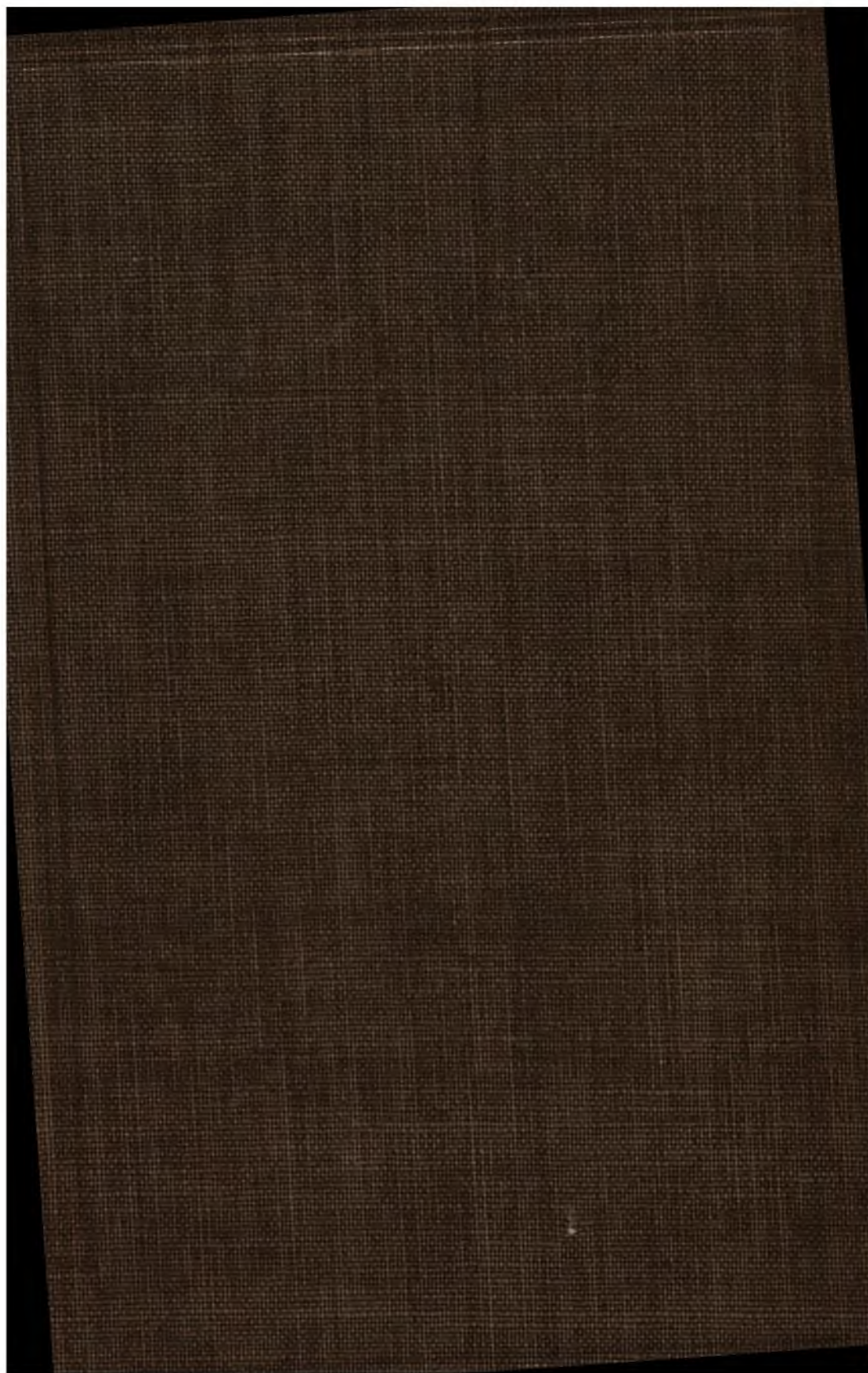
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



University of Michigan Film Library



4 9015 00301 2151



Ref
KFM
4252
. A341
1872

96-8150

REPORTS
OF
CASES DETERMINED
IN THE
COURT OF CHANCERY
OF THE
STATE OF MICHIGAN.

BY
E. BURKE HARRINGTON,
COUNSELOR-AT-LAW.

SECOND EDITION:
WITH NOTES AND REFERENCES TO LATE DECISIONS,
By THOMAS M. COOLEY.

DETROIT:
FREE PRESS BOOK AND JOB PRINTING ESTABLISHMENT.
1872.

Entered according to Act of Congress, in the year 1872,
BY HENRY N. WALKER,
In the office of the Librarian of Congress, Washington, D. C.

CASES
DETERMINED IN THE
COURT OF CHANCERY
FOR THE
STATE OF MICHIGAN,
BY
ELON FARNSWORTH, CHANCELLOR,
From his appointment in 1836, to March, 1842.

PREFACE TO ORIGINAL EDITION.

The volume which is now presented to the public contains all the decisions made by the Hon. Elon Farnsworth while acting as Chancellor, which have been preserved. Prior to the year 1836, there was no court of equity distinct and separate from the courts of law. The Ordinance of Congress of 1787, for the government of the territory northwest of the River Ohio, did not establish a distinct and separate tribunal for the exercise of powers usually conferred upon courts of chancery. Neither did it vest in the courts of law any authority to exercise such powers. The provision relative to the legislative power authorized the governor and judges to adopt such laws of the original States as might be necessary and best suited to the circumstances of the district, which were to be in force unless disapproved of by Congress. Among the earliest acts of the territorial government of Michigan, was one relative to the jurisdiction of the courts, which was passed July, 1805, and declared that the Supreme Court should have original and exclusive jurisdiction in all cases, both in law and equity, where the title of lands was in question, but no suit in equity should be sustained in any case when adequate remedy could be had at law. The same statute provided that "on trial of cases in equity, oral testimony and the examination of witnesses in open court should be admitted." In 1820 the Governor and Judges, who were still vested with the legislative power, passed an act directing the mode of proceeding in suits in chancery. By this law the county courts of the several counties were invested with jurisdiction in all cases properly cognizable in a court of chancery, in which plain, adequate and complete remedy could not be had at law, where the title to land was not in question, and when the sum or matter in dispute did not exceed the sum of one thousand dollars; and the Supreme Court had jurisdiction in all cases where the title of lands was in question, and where the sum or matter in dispute exceeded the sum of one thousand dollars. The Supreme Court had also appellate jurisdiction in all cases heard and determined in the county courts.

In 1823, some doubts having arisen as to the powers of the courts, Congress passed an act declaring that "the powers and duties of the judges of the said territory should be regulated by such laws as are or

may be in force therein, and the said judges shall possess a chancery as well as common law jurisdiction."

In 1827, the laws of the territory were revised, and the circuit courts, which had been organized, obtained concurrent equity jurisdiction with the Supreme Court, subject, however, to an appeal thereto, and were invested with the exclusive power of deciding appeals from the county courts. It was provided by the law of 1827, that proceedings in chancery, "when they are not regulated by the statutes of this territory, shall be regulated by the judges thereof, conforming to the rules and proceedings established by courts of chancery in England, so far as the same shall be consistent with the laws and constitution of the United States and the laws of the Territory of Michigan." In 1833 the laws were again revised, but no material alteration was made relative to the mode of proceeding in suits in equity.

By the constitution of the State, adopted in 1835, the judicial power was vested in one Supreme Court and in such other courts as the legislature might from time to time establish. At the first session of the State legislature a separate tribunal was created, which was invested with all the equity powers previously conferred upon the several territorial courts, and in July, 1836, Elon Farnsworth, Esq., of Detroit, was appointed chancellor. Mr. Farnsworth continued to perform the duties of chancellor with great satisfaction to the public and the members of the bar until March, 1842, when he was compelled to resign the office on account of his health. During the time Mr. Farnsworth was chancellor, the practice of the court was regulated by a well digested system of rules prepared by him, which are published with the present volume.

In 1838 provision was made by law for the appointment of a reporter of the decisions of the court of chancery, and in February, 1839, E. Burke Harrington, Esq., received the appointment, and entered upon the duties of his office. About one-half of the present volume was published under his immediate supervision, in January, 1841. The destruction, by fire, of the printing office, with a portion of the manuscript prepared for the press, suspended the publication for a time, and the repeal of the law soon after effectually put a stop to the work until 1844, when the legislature passed another act requiring the judges of the Supreme Court and chancellor to appoint a reporter of the decisions of these courts. Mr. Harrington received the appointment under the last act, and continued to perform the duties of the office until his decease in August, 1844. The last half of the present volume was then partially in press, and almost wholly prepared by him. The undersigned was appointed to fill the vacancy occasioned by the death of Mr. Harrington, and has superintended the publication from his manuscript since that time.

PREFACE.

vii

The decisions of the court are in all cases given as they were delivered in writing at the time, or prepared by the chancellor from his notes. A second volume of the decisions of the court of chancery, commencing with the appointment of Chancellor Manning, is now in press, prepared by the undersigned, and will be published during the ensuing year.

HENRY N. WALKER.

DETROIT, November 30, 1844.

PREFACE TO THE SECOND EDITION.

Harrington's Reports having for some time been out of print, the undersigned, at the request of Mr. Walker, has taken charge of a new edition. In introducing it to the reader, perhaps a few additional words regarding the court of chancery of this State may not be inappropriate. In the year 1846, during the fever for radical changes in the law which prevailed extensively throughout the country, and which affected considerably the politics of this State, a provision was incorporated in the revision of the statutes then being made, and which was to take effect March 1, 1847, abolishing the distinctive equity court. Thereupon Chancellor Manning resigned, and the Hon. Elon Farnsworth was a second time called upon to perform the duties of chancellor for the brief period which would elapse before the new revision would take effect. Chancellor Manning was thoroughly familiar with equity law, and fully imbued with the spirit of its principles; and his disposition to insist upon correct practice was well understood, and had an important influence in educating a good chancery bar. When that clear-headed, upright and conscientious judge withdrew from the bench, and when his temporary successor followed him, the excellent and uniform chancery practice which had grown up soon fell into a disorder from which it has never recovered.

The principal reason for this was the organization of the court of chancery which was substituted by the Revised Statutes. That consisted in making the several circuit courts courts of equity, and expecting and requiring them to administer equity law under the established forms and according to the settled principles. Aside from the improbability of finding in every circuit a lawyer who was at the same time sufficiently versed in the law administered in the court of chancery to fit him to be chancellor, and also willing to accept the position of circuit judge at the meager compensation which has always been paid in this State, there was the further difficulty that uniformity of practice was no longer to be expected when we had eight or more equity judges administering justice independently, and with no common tribunal to supervise their proceedings. For though the appeal to the Supreme Court in chancery cases was still retained, yet that remedy would do very little towards harmonizing the practice, not merely because it was only allowed from final decrees or orders, but also because most matters of practice are matters of discretion, and not subject to review at all under our statutes. It is, therefore,

no impeachment of the learning or ability of the circuit judges, many of whom have been eminent and able lawyers, to say that chancery practice has fallen into confusion, and that few lawyers now even pretend to be thoroughly familiar with either the pleading or the practice of that court. Whether the cause of justice has suffered in consequence is a question the discussion of which we shall not enter upon in this place.

That the independent court of chancery had become unpopular in 1846 is perhaps sufficiently proved by its abrogation : but that it became so mainly in consequence of abuses supposed immemorially to have inhered in chancery practice, particularly in England, rather than because any were complained of here, we believe to be true. No stain ever attached to the judicial ermine as worn by Chancellors Farnsworth and Manning ; and the spontaneity with which the people called upon the latter to occupy one of the seats on the bench of the independent Supreme Court when that tribunal was organized, sufficiently evinced their confidence in his learning, industry, impartiality and integrity, and their appreciation of his former judicial labors.

In preparing for the press a new edition of Harrington's Reports, many difficulties were encountered. That gentleman, as is above stated by Mr. Walker, had deceased before his work was completed, and there are many evidences that much of it had been left to the hands of clerks imperfectly qualified to perform it. An effort has been made to improve some of the statements of cases, but this has not always been practicable without access to original papers not now attainable. Some improvement, it is nevertheless hoped, has been introduced, particularly in the head notes. And the references which are made to the subsequent cases bearing upon the same or analogous questions, it is believed will be found a convenience to the practitioner. The original paging has been preserved, for convenience in tracing former references.

THOMAS M. COOLEY.

ANN ARBOR, October, 1872.

TABLE OF CASES REPORTED.

Alden, Cooper v.....	72
Allen, Connor v.....	871
Ankrim v. Woodworth.....	855
Atterbury, Payne v.....	414
Attorney-General v. Bank of Michigan.....	815
Atwater v. Kinman.....	248
Bank Commissioners v. Bank of Brest.....	106
Bank of Brest, Bank Commissioners v.....	106
Bank of Michigan, Attorney-General v.....	815
Bank of Michigan, Wales v.....	808
Bank of Michigan v. Williams.....	219
Bank of Pontiac, Barnum v.....	116
Bank of Windsor, Pratt v.....	254
Barnes, Kellogg v.....	258
Barnum v. Bank of Pontiac.....	116
Barrows v. Doty.....	1
Barton, McLean v.....	279
Bates v. Garrison.....	221
Beaubien v. Poupard.....	206
Bennette, McMurtrie v.....	124
Bernard v. Bougard.....	180
Bomier v. Caldwell.....	67
Bougard, Bernard v.....	180
Brown v. Gardner.....	291
Brown, Whipple v.....	436
Burtch v. Hogge.....	81
Caldwell, Bomier v.....	67
Camp, Eldred v.....	162
Campbell, Pratt v.....	236
Carpenter, Higgins v.....	256
Carroll v. Farmers' and Mechanics' Bank.....	197
Carroll v. Van Rensselaer.....	225

City of Detroit, Devaux <i>v.</i>	98
Clark <i>v.</i> Davis.	227
Clark <i>v.</i> Saginaw City Bank.....	240
Clinton Canal Bank, Wheeler <i>v.</i>	449
Comstock, Sinclair <i>v.</i>	404
Connor <i>v.</i> Allen	871
Cook <i>v.</i> Wheeler.....	443
Cooper <i>v.</i> Alden.....	72
 Davis, Clark <i>v.</i>	227
Dequindre, Suydam <i>v.</i>	347
Detroit City Bank, Mason <i>v.</i>	222
Devaux <i>v.</i> City of Detroit.....	98
Disbrow <i>v.</i> Jones.....	48, 102
Disbrow, Jones <i>v.</i>	102
Doty, Barrows <i>v.</i>	1
Doty, Mack <i>v.</i>	366
Doty, Rowland <i>v.</i>	3
Dow, Street <i>v.</i>	427
 Eldred <i>v.</i> Camp.....	163
Elmore, Graham <i>v.</i>	265
Erie & Kalamazoo Railroad Bank, Fay <i>v.</i>	194
 Farmers' and Mechanics' Bank, Carroll <i>v.</i>	197
Fay <i>v.</i> Erie & Kalamazoo Railroad Bank.....	194
Freeman <i>v.</i> Michigan State Bank.....	311
 Gardner, Brown <i>v.</i>	291
Garrison, Bates <i>v.</i>	221
Goff <i>v.</i> Thompson	60
Graham <i>v.</i> Elmore.....	265
Graves <i>v.</i> Niles.....	332
 Hammond <i>v.</i> Place.....	433
Hart, Lapeer County <i>v.</i>	157
Hawley <i>v.</i> Sheldon.....	420
Higgins <i>v.</i> Carpenter.....	256
Hogge, Burtch <i>v.</i>	31
Hulbert, Stafford <i>v.</i>	435
 Ingersoll, Kirby <i>v.</i>	172
Jerome <i>v.</i> Seymour	255

TABLE OF CASES REPORTED.

xiii

Jerome v. Seymour	357
Jones, Disbrow v.....	48
Jones v. Disbrow	102
Jones, Livingston v	165
Jones v. Wing.....	801
 Kellogg v. Barnes.....	258
Ketchum, Sill v.....	423
King, Wright v.....	12
Kinman, Atwater v.....	243
Kirby v. Ingersoll.....	172
 Lane, Thayer v.....	247
Lapeer County v. Hart.....	157
Livingston v. Jones	165
Loranger, Wadsworth v.....	113
Lyon, Weed v.....	363
 Mack v. Doty.....	366
Mack, Thompson v.....	150
Mason v. Detroit City Bank	222
McLean v. Barton	279
McMurtrie v Bennette	124
Michigan State Bank, Freeman v	311
Millerd v. Ramsdell.....	373
Millerd, Ramsdell v.....	373
 Niles, Graves v.....	332
 Payne v. Atterbury	414
Peltier v. Peltier.....	19
Place, Hammond v	438
Poupard, Beaubien v.....	206
Pratt v. Campbell.....	236
Pratt v. Bank of Windsor.....	254
 Ramsdell v Millerd....	373
Ramsdell, Millerd v.....	373
Rowland v. Doty	8
 Saginaw City Bank, Clark v.....	240
Saginaw City Bank, Smith v.....	426
Schwarz v. Sears.	440
Schwarz v. Wendell.....	395

Wright v. King.

After a verdict or trial at law, it is too late to come to this court for discovery or relief. This court will not afford relief to a party on the ground that he has lost his remedy at law. He should have applied for a discovery before trial. *Le Guen v. Gouverneur*, 1 Johns. Cas., 492, 502; *Duncan v. Lyon*, 3 Johns. Ch., 351; *Lansing v. Eddy*, 1 Johns. Ch. 51; *Smith v. Lowry*, Id., 320; *Barker v. Elkins*, Id., 465; *Penny v. Martin*, 4 Johns. Ch., 576; 5 *Peters*, 503.

The statute of frauds is a perfect bar to the present bill.

To raise a trust by implication or operation of law, an actual payment, or actual loan of money, must be shown. *Steere v.*

Steere, 5 Johns. Ch., 1. To take the case out of the statute 15 of *frauds, its terms and conditions must be in writing and signed by the party to be charged.

C. W. Whipple, contra.

THE CHANCELLOR. It is a well established principle in equity, that if a party has a defense at law, of which he is advised before the trial, and neglects to make it, or to apply to this court for a discovery, if necessary to his defense in aid of the trial at law, he is precluded and cannot afterwards have relief in this court.

Lord Hardwicke says, it must appear that the defendant was ignorant at the time of the trial, of the fact which renders the verdict at law contrary to equity; and even then, chancery will not relieve where the defendant submits to try it at law first, where he might, by a bill of discovery, have come at the facts by the plaintiff's answer before trial at law. (*See 1 Johns. Ch., 50.*)

In 1 *Schoales and Lefroy's Reports*, 201, *Lord Redesdale* says: "I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed at law;" and at the close of the opinion, he says: "I think it unconscientious and vexatious to bring into a court of equity a discussion which might have been had at law."

Wright v. King.

In the court of errors in New York, in the year 1800 (*1 Johns. Ch.*, 436), it was decided, in a case involving a large amount, that where a party in a suit at law has a knowledge of fraud or other matter of defense, and neglects to make his defense at law, a court of chancery will not interfere.

In the case of *McVickar v. Wolcott*, 4 *Johns.*, 510, in 1808, Van Ness, Spencer, and Kent on the bench, it was decided that a court of chancery will aid a defendant in obtaining a discovery before a trial, but not afterwards.

Van Ness, J., in giving his opinion, says: "Granting that such answer would have furnished a complete defense, still as they omitted to take the necessary steps to possess themselves of that answer before the trial at law, which they might, and, if they *deemed it important, ought to have pursued, they 16 are now too late." The other judges concurred in the same conclusion.

In *1 Johns. Ch.*, 51, Chancellor Kent says: "The general rule is that this court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it could not have been received as a defense. If a party will suffer judgment to pass against him by neglect, he cannot have relief here for a matter which he might have availed himself of at law."

In *Thompson v. Berry*, 3 *Johns. Ch.*, 395, which was a case of exceeding hardship, relief was granted as to that part of the demand to which no defense at law could have been made; but the court refused to interfere as to the balance, because the party had suffered judgment at law to pass against him, without making his defense or applying for discovery before the trial.

In the case of *Smith v. Lowry*, 1 *Johns. Ch.*, 320, where an iniquitous judgment was obtained by subornation, the same rule was rigorously adhered to.

As the same question is involved in several cases now pending in this court, I have purposely referred, briefly, to the leading

Wright v. King.

decisions made at different periods, both in England and this country, and by men who are universally acknowledged to have been the great luminaries in this branch of jurisprudence.

When we find such men as Lord Hardwicke, Lord Redesdale, Van Ness and Kent concurring in the same principles, it would almost be presumption to question the correctness and justice of those principles.

It remains only to apply these principles to the case under consideration. It was urged at the hearing, that, from difference of parties, an insurmountable difficulty existed in obtaining the aid of this court by a discovery prior to the trial at law. I cannot perceive any such difficulty. King, the party enjoined here, was

either a party to the agreement to release and indemnify
17 the complainant from all his liabilities for Collins, * and
among others the note to Kinzie, or he was not. If he
was not a party to that agreement he is not bound by it; and it
would be unjust and contrary to equity to enjoin and inhibit him
from the collection of Wright's proportion of their joint liability.
If King was a party to that contract, a discovery of that fact
might have been obtained by a bill for that purpose in this court,
and it would have been a perfect defense to the action at law by
King against the complainant; nor can there be a doubt that a
court of chancery would have stayed proceedings at law, until
an answer to the bill for discovery could have been obtained.
But, from the case made by the bill, it would seem that the
complainant had a defense at law, without resorting to a court of
chancery. According to the statement in the bill, Goodwin
knew all the facts, and what the contract was; and I cannot
perceive on what grounds King could have objected to the intro-
duction of Goodwin as a witness, on the trial of the suit at law,
between King and the complainant.

It occurred to me at the hearing, that it was possible that the
bill could be sustained on the ground of the trust, as urged in the
argument; but, upon further examination, and on the authority
of the case in *5 Johns. Ch., 1*, I am satisfied that it cannot.

Wright v. King.

To raise a trust by implication there must be an actual payment of money ; and to take the case out of the statute of frauds, the terms and conditions of the trust must be in writing, under the hand of the party to be charged. There may be other special circumstances where courts have declared a trust, none of which exist here.

Upon the whole, I am of the opinion that the injunction cannot be sustained, but must be dissolved.

Injunction dissolved.

Peltier v. Peltier.

Emily Peltier v. Charles Peltier.

1h	139
6	167
6	318

Equity practice: Contempt: Irregularity. A defendant in contempt cannot move to set aside proceedings; but where there is merely a failure on his part to comply with the provisions of an interlocutory order, he may move to discharge the order for irregularity.

Married woman: Prochten amt. A bill by a married woman against her husband must be filed by *prochten amt.* (a.)

Equity practice: Process. A subpoena is the first process. It is irregular to have injunction and *ne exeat* issued and served before the issue of subpoena.

Alimony: Jurisdiction. A court of chancery has no jurisdiction of a case where the bill is filed for alimony merely. (b.)

The bill in this case was filed May 31, 1836, in the supreme court of the Territory of Michigan, in chancery sitting, and set forth that the complainant came into the Territory of Michigan in the year 1834, and had resided in said territory ever since; that in the month of January following, being then of the age of twenty years, she was married to the defendant, who was then twenty-six years of age, or thereabouts; that soon after the marriage, and within one month, the defendant evinced angry feelings toward her, and abused and ill-treated her, and frequently resorted to acts of violence upon her person; that in the month of November, 1836, complainant was confined and delivered of a child, which the defendant also ill-treated; that this conduct was frequently repeated; and particularly in the month of April, 1836, he had treated the child with great cruelty, and had beat with great violence and inhumanly treated the complainant, and used the most violent threats toward her, and soon after abandoned her, and went from Port Huron, in the county of St. Clair,

(a.)—As to mode of appointment, see *Markham v. Markham*, 4 Mich., 305. The necessity for the appointment is now dispensed with by statute. (Comp. L. 1857, Secs. 3290, 3294.

(b.)—As to granting alimony in divorce cases where the divorce is denied, see *Chaffee v. Chaffee*, 15 Mich., 184; *Cooper v. Cooper*, 17 Mich., 205; *Bishop v. Bishop*, 17 Mich., 211.

Peltier v. Peltier.

where he then resided, to the city of Detroit; and had not since returned to her.

The bill further set forth, that by reason of the shortness of her residence in the territory, she was unable to avail herself

* of the statutory provision enabling persons resident three 20 years in the territory to procure divorces for the cause of cruel treatment, and that complainant had no means of support for herself and child (who was then aged six months), nor for their clothing, or to pay counsel fees, and that the defendant had adequate means for that purpose; that defendant had been applied to on behalf of complainant to make some provision or allowance for the purposes aforesaid, and also for the education of the child, which he had refused to do.

The bill also set forth that defendant had declared his intention to leave this country and go to Europe to reside, as soon as he could raise sufficient money to enable him to do so; and that he was then actually arranging his affairs for that purpose, and had threatened to take from her the child and carry it away with him.

The bill prayed that defendant be restrained by injunction from molesting the retreat and invading the retirement and privacy of complainant, or in any way intermeddling with her, and that defendant might be restrained from taking away from complainant the custody and care of the child, or interfering with her management of the same, and that she might have the sole and absolute custody, care and management of the child; and that defendant be decreed to maintain and support complainant and the child, and to pay such allowance weekly as should be found suitable and adequate for the maintenance and clothing of complainant, and also for the clothing, maintenance and education of the child, and that the regular payment thereof be secured; and for such reasonable sum to enable complainant to prosecute her suit as to the court should seem proper.

It also prayed for a writ of *ne exeat* to restrain defendant from departing the territory, and for a subpoena, in the usual form.

Peltier v. Peltier.

A writ of *ne exeat*, directing security to be given in the sum of \$5,000, and also the writ of injunction prayed, were allowed by the Hon. George Morell, one of the justices of the supreme court.

21 * The injunction and *ne exeat* were served on the defendant June 6, 1836.

At the same term, June 20, *Woodbridge* and *Backus* filed the following motion :

Woodbridge and *Backus* move that the injunction in the premises issued be dissolved, and that said writ be set aside, and for reasons show to the court here, the following, to wit :

1. For that the same is irregular.
2. For that the same is not sanctioned by any equity in the bill of complaint contained.
3. For that no bill of complaint is regularly filed or exhibited in the premises.
4. For that the case made thereby is disproved by affidavits.
5. For that the subject matter of said writ is not an appropriate nor legal subject for a writ of injunction.
6. For that the same issued without subpoena and improvidently.

They also move that the *ne exeat* in said cause issued be discharged, and the same writ be set aside :

1. For that the same issued improvidently and irregularly.
2. For that no definite sum of money is therein, nor in said bill, shown to be due, nor at hazard, either at law or in equity.
3. For that this honorable court has not jurisdiction of matrimonial causes, except for the purpose of granting divorce ; and said bill neither presenting a case nor containing a prayer for such divorce, though the same purports to be a matrimonial cause, the subject matter of said writ, and the aid sought to be obtained thereby, are illegal and incompetent.
4. For that said writ is not accompanied by a subpoena to answer.

Peltier v. Peltier.

5. For that no bill of complaint by a competent party is regularly filed in the premises.

6. For that the case presented therein is disproved by affidavit.

They also move that the bill of complaint in the premises, exhibited and filed, be dismissed :

22 *1. For that the said bill is exhibited and filed by Emily

Peltier alone, whereas it appears by the showing thereof that said Emily is a *feme covert*, and in no wise competent in the law to file said bill, except in the name of her *prochein ami*.

2. For that this honorable court has no jurisdiction of the subject matter of said bill, and that no subpoena *ad respondendum* has been served thereupon.

At the same term, June 29, the supreme court granted an order that the defendant forthwith pay into the hands of the register of the court, for the use of the complainant, the sum of \$40, in order to enable her to defray the expenses in the prosecution of this suit ; and also that defendant pay every week, from that day, into the hands of the register of the court, for the use, support and maintenance of complainant, the sum of \$4, until the further order of the court.

A certified copy of said order, together with a subpoena to answer the bill of complaint, were served on defendant July 27, 1836.

On the organization of the State government, this cause, among others pending on the chancery side of the supreme court of the territory, was transferred to the court of chancery established under the State government, and was continued by consent of parties until the February term of the court of chancery, when *Woodbridge* renewed the motion to dissolve the injunction and set aside the writ ; and that the *ne exeat* be discharged and the writ set aside ; and that the bill be dismissed for irregularity and want of jurisdiction ; and also moved that the order made June 29, 1836, be discharged, vacated and rescinded, on the ground that the same was made unadvisedly, improvidently and *ex parte*.

At the same term, *A. D. Frazer*, solicitor for complainant, on

Peltier v. Peltier.

filing the affidavit of John Winder (who was on the 29th day of June, 1836, register of the supreme court of the territory, and now register of the court of chancery) that the order made June 29, 1836, by the supreme court, had not been complied with, and that no money had been paid into his hands by defendant for the use of complainant, to defray the
 23 * expenses of this suit or for alimony, moved that defendant be committed for a contempt of court, for not complying with the order.

Both motions came on to be heard at the same time.

Wm. Woodbridge, solicitor for defendant.

Woodbridge moves to dissolve injunction, discharge *ne exeat*, and dismiss the bill for irregularity and want of jurisdiction, and resists the motion of complainant for the same reasons; and he insists that no bill and no parties are *regularly here*, and therefore it is not competent to make an allowance.

1. It is not competent for a *feme covert* to file a bill in *her own name*. If the bill be against her husband, she must sue by her *prochien ami*. This is a rule so perfectly established and so familiarly known, that no authority can be necessary to support it. If an application for a *divorce* can be sustained in the name of a married woman (without a *prochien ami*), it is because of an express provision of the *statute* in that regard. This is not an application for a divorce. See *Wood v. Wood*, 2 *Paige*, 457; *Mitford*, 153; *Cooper*, 28, 163; *Clancy on the Rights of Married Women*, 358; 2 *Kent*, 137.

2. It is irregular to cause *any* action upon a bill, even to issue injunction, unless simultaneously there be a *subpœna* to answer; and can such an order pass without an appearance? See *Parker v. Williams*, 4 *Paige*, 439; *Attorney-General v. Nichol*, 16 *Ves.*, 338; *Eden*, 35; *Fellows v. Fellows*, 4 *Johns. Ch.*, 25; *Eden*, 232.

3. This court has no jurisdiction of the subject matter of the bill. The essential scope of the bill is to obtain a *supplicavit* and

Peltier v. Peltier.

alimony. Now, as to a *supplicavit*, a court of chancery cannot exercise jurisdiction of it, at least, unless that *matter 24 arise *incidentally* in the course of the exercise of another and a principal object of the suit. (*Codd v. Codd*, 2 Johns. Ch., 141.)

For the rest, the judicial officers of the law in the territory are abundantly competent, in the ordinary administration of the law, to furnish all the relief and protection necessary. (*Codd v. Codd*, 2 Johns. Ch., 141; *Head v. Head*, 3 Atk., 550.)

Of alimony this court can have no jurisdiction, except so far as *incident* to the power of granting a divorce. (*Lewis v. Lewis*, 3 Johns. Ch., 519; *Mix v. Mix*, 1 Johns. Ch., 108; 1 Fond., 96; *Head v. Head*, 3 Atk., 547; 2 Chit. Pra., 434-5, 462-3; 1 Mad., 305-7, note.)

Or unless it be applied for upon the footing of an agreement of separation, and allowance of separate maintenance duly entered into, and even then it would be exceedingly doubtful, unless some third person had acquired an interest, or the agreement had been entered into with some third person (*Bullock v. Menzies*, 4 Ves., 799); or where it is claimed to accrue from a trust fund which chancery only can touch; and, as a general rule, chancery has no jurisdiction in matrimonial cases. (*Legard v. Johnson*, 3 Ves., 351.)

Chancery has never established a separation, except in pursuance of a previous agreement, and with great reluctance even then. (1 Mad., 305-7.) Nor, of course, does it grant alimony as a principal object of relief.

4. But if alimony were regularly claimed, as a measure of relief, *purely incidental* to some other principal prayer, still the party petitioning for it should apply in due form. How can the court regulate the amount? Suppose the defendant were insolvent! Suppose worth \$50,000 per annum! Would the rate of allowance be the same? If the application were *secundum artem*, the party would file a petition, give notice of it, and file also an "allegation of faculties." This allegation of faculties, being

Peltier v. Peltier.

answered by respondent under oath, would exhibit a true state of his funds and capacity to pay. Nor will counsel fees be
25 allowed by the court where *there is jurisdiction, except *ex necessitate*. (3 Johns. Ch., 519.)

5. The bill is not, in contemplation of law, sworn to at all. A wife cannot be allowed her oath against her husband, in any case, as a general rule, except where she swears articles of the peace against him, or where personal violence is committed upon her; and therefore neither injunction, *ne exeat* nor *supplicavit* are regular. (Sedgwick v. Watkins, 1 Ves., 49.)

But it is anticipated that the court will consider the motion to dissolve the injunction, discharge the *ne exeat*, and dismiss the bill at the same time, and for the reasons on file, as the consideration of the whole matter involved in this motion is almost necessarily involved in the motion submitted by complainant. Writs of *ne exeat*, affecting the rights of personal liberty, are never granted except reluctantly. (Woodward v. Schatzell, 3 Johns. Ch., 412.) Never, except a *specific sum* appear manifestly due, and in imminent danger of loss unless it be allowed, and which courts of law are incompetent to save. (2 War. Cha., 161; 1 Ves., 49, 94; 2 Atk., 210.) Here no *sum* has been decreed or sworn to. If there rest any liability on the part of the husband to pay for the support of the wife, it is a liability at law; let him be sued for it.

The injunction is equally untenable. The bill is irregularly filed. It is as if there were no bill, for (unless perhaps for divorce, and this is not) the wife cannot file her bill without her *prochien ami*, and the injunction must be dissolved, for there is no subpoena to answer. The subject matter and scope of the injunction is without precedent and illegal. The complainant meant to pray for and obtain a *supplicavit*, not an injunction. But it is by statute that in England the chancellor exercises this power, and, I apprehend, never, even there, except in a matter incidental to the main object of the suit. Such an injunction interferes with the marital rights and duties of the husband in a way not to be tolerated. But if life were in danger, a justice of the peace

Feltner v. Feltner.

would bind the party to his good * behavior, leaving the 26 wife where the law leaves her, in the custody and under the protection of the husband.

The bill should be dismissed, because the court has no jurisdiction of its subject matter.

Alexander D. Fraser, for complainant.

The complainant contends that the general rule is, that the party must clear his contempt before he can be heard. (*Howles v. Youngs*, 9 Ves., 173; *Hewitt v. McCurtney*, 13 Id., 560; *Anon.*, 15 Id., 174.)

On a question whether the defendant could, before his contempt was cleared, though he offered to pay all the plaintiff's demand, ordered that he should bring before the master, principal, interest and cost, and then be at liberty to move to discharge sequestration. (*Lord Wenman v. Osbaldiston*, 2 Brown P. C., 142.)

Though an injunction be irregularly obtained, it must be obeyed or the party is in contempt. (*Woodward v. King*, 2 Ch. Ca., 203, 127; *Partington v. Booth*, 3 Meriv., 148.)

Alimony has been decreed to a wife without a divorce, where she was compelled to leave the husband from ill usage, although she had not been beat or turned away (*Rhame v. Rhame*, 1 McCord Ch., 205; *Thornberry v. Thornberry*, 2 J. J. Marshall, 324; *Denton v. Denton*, 1 Johns. Ch., 364; *Hewitt v. Hewitt*, Bland Ch., 101; *Jelineau v. Jelineau*, 2 Dessaus., 45); and if there be no precedent the court will make one. (*Devall v. Devall*, 4 Dessaus., 79; *Anon. Id.*, 94; *Taylor v. Taylor*, Id., 167; Id., 183.)

The court of chancery has jurisdiction in all cases of alimony, and defendant will be committed until he comply with the decree. (*Purcell v. Purcell*, 4 Hen. and Munf., 507; Id., 515; Id., 517; Id., 520; *Anon.*, 1 Hayne, 347.)

Courts of chancery, in the United States, have authority to decree alimony independent of any legislative enactment; temporary alimony, and money to carry on the suit, is a matter of course. (*Fishli v. Fishli*, 2 Litt., 337; *Butler v. Butler*,

Peltier v. Peltier.

4 *Id.*, 202; *Wright v. Wright*, 1 *Edw.*, 62; *Smith v. Smith*, *Id.*, 255; *Stanford v. Stanford*, *Id.*, 317.)

An injunction was appropriate to prevent intercourse or molestation on the part of the husband. (*Warter v. Yorke*, 19 *Vesey*, 454.)

It is competent for a *feme covert* to institute suit without a *prochein ami*; and the affidavit of the wife may be received against the husband, and will authorize the granting of an injunction and *ne exeat*. (*Kirby v. Kirby*, 1 *Paige*, 261; *Pyle v. Cravens*, 4 *Litt.*, 18.)

Woodbridge in reply.

It is admitted that when a contempt is "fixed" upon one, he cannot, in general, move until the contempt "is purged."

But even this rule applies rather to appeals to the "discretion"—that is, to the *favor* of the court, and does not and *cannot* preclude the enforcement of *mere* right. (*Johnson v. Pinney*, 1 *Paige*, 646; 9 *Wheat.*, 868.) The nullity of an order, etc., may be always shown.

But in this case there is no *contempt fixed*. At the first practicable moment, the motion is made to set aside the order for irregularity, etc., and before any movement of complainant.

But to this moment nothing under that order is done by complainant to bring us in contempt. An order or a decree (and they both stand upon the *same* footing) to pay money, is to be enforced by "execution," and in that way only. And especially where the order is to pay money, the course is by execution. (2 *Mad.*, new ed., 402-4; 8 *Ves.*, 381; 2 *Mad.*, old ed., 305.)

And until complainant move, by execution upon the order against us, it *cannot* be enforced. In New York there is an express statutory provision for the enforcement of orders, etc., by serving *copies*, but *we* have no such statutory provision.

28 *Another matter is worthy of note: that is, that *Winder's* affidavit was not filed until *this* term. And if our situation in this regard brings us within the rule alluded to, then *any sug-*

Peltier v. Peltier.

gestion of contempt, without affidavit, will at any time be found to be a sufficient apology for *suppressing* all claim of legal and constitutional right. But if the party were technically in contempt, still it is competent to set aside the *order* which is rendered against him for irregularity, even—much more for nullity. (*Green v. Green*, 2 Sim., 394; *Jenkins v. Wild*, 2 Paige, 394.)

And this doctrine is practically supported by the numerous New York cases. For in all of them, perhaps—in most of them, certainly—laborious investigations are gone into to show the regularity of the proceedings, or the contrary, and all clearly supporting the proposition that where the irregularity is so glaring as to amount to nullity, this fact may be shown. (*Higbie v. Edgerton*, 3 Paige, 253; *Sanford v. Brown*, 4 Paige, 360; *Sullivan v. Judah*, Id., 444; *Osgood v. Johnson*, 3 Paige, 195; *People v. Spalding*, 2 Paige, 329.) And these, apparently, contain the most unfavorable aspect, as against us, which the doctrine will bear. And the mere failure to comply with an interlocutory order, *does not of itself* place the party in contempt, nor preclude him from showing its irregularity. (*Hill v. Bissell*, *Mose. R.*, 259; 1 *How. Pra.*, 369.)

THE CHANCELLOR.—These are cross motions, and must necessarily both be considered at the same time.

When a defendant is in contempt, he cannot move to set aside proceedings; but when there is merely a failure on his part to comply with the requisitions of an interlocutory order, he may move to discharge the order for irregularity. (*Hill v. Bissell*, *Mose. R.*, 259.)

Here no contempt is fixed, and the defendant moves to set aside the order at the earliest opportunity. Orders of this kind are usually enforced by execution, and a mere failure to comply with the requisitions of such an order, is not such a *contempt as will preclude the party from moving to 29 discharge the order and set aside the proceedings for irregularity.

Peltier v. Peltier.

The proceedings in this case seem to have been irregular throughout. The bill was filed by a *feme covert* without *prochein ami*, and was, therefore, improperly before the court. (*Wood v. Wood*, 2 *Paige*, 454; *same case on appeal*, 8 *Wend.*, 357; *Mitford*, 153; *Cooper*, 163.)

The injunction and *ne exeat* were issued May 31, 1836, returnable on the first Monday of June following, and were served June 6, 1836. The subpœna was not issued until the second day of July, 1836. This was clearly irregular. (*Parker v. Williams*, 4 *Paige*, 439; *Attorney-General v. Nichol*, 16 *Ves.*, 338.)

The next question which arises is as to the jurisdiction of the court.

The bill in this case is filed, not for a *divorce*, but for *alimony* merely.

It appears from the authorities cited by the counsel for the complainant, that the courts of South Carolina have entertained bills of this kind; but they have usually been to carry into effect some marriage contract, or where a trust property was involved. I can find no other case where the jurisdiction has been sustained when the question has been raised. In the case of *Hewitt v. Hewitt*, 1 *Bland*, 101, the jurisdiction was not questioned, the facts were admitted, and the whole matter was submitted to the court. The cases referred to in the note to that case are too indefinite to entitle them to any weight as authority.

The whole current of authorities goes to show that courts of chancery have never entertained jurisdiction in cases of this kind, except in aid of some other court, or to carry into effect a marriage contract, or in the execution of a trust. (*Pearne v. Lisle*, *Ambler*, 75; *Perry v. Perry*, 2 *Paige*, 501.)

In England, when the court of chancery succeeded to the jurisdiction of the *spiritual courts* during the usurpation, it entertained suits of this kind, but not since the restoration. (See 30 * *Head v. Head*, 3 *Atk.*, 551; *Watkyns v. Watkyns*, 2 *Atk.*, 98; *Fonb. Eq.*, 98, note n.)

In the case of *Codd v. Codd*, 2 *Johns. Ch.*, 141, the bill prayed

Peltier v. Peltier.

for a writ of *supplicavit* to protect the person of the petitioner, and her property and children, from insult and injury, pending the suit, and Chancellor Kent refused the writ, saying, "Why should not the party apply to a justice of the peace to bind the other to good behavior?"

The cases cited in *Dessaussure's* equity reports of South Carolina, seem to be a departure from principle, and cannot, therefore, be regarded as authority in this case. If it is intended that courts of chancery should take jurisdiction of this class of cases, that jurisdiction must be given by law. I am satisfied that, exclusive of any statutory provision upon the subject, this court has no jurisdiction to entertain proceedings of this kind.

The orders must be discharged and the bill dismissed.

Burtch v. Hogge.

Jonathan Burtch v. Hannah Hogge and others.

Taking depositions: Agent of party acting in absence of commissioner. Where the agent or attorney of the complainant examined witnesses and wrote their depositions, and the commissioner before whom they were taken was absent from the room several times during the examination, and the defendant did not appear and cross-examine the witnesses, the proceedings were held to be irregular, and the depositions were suppressed. (a.)

Irregularities or unfairness in taking depositions will, it seems, be taken notice of by courts of equity in any stage of the proceedings in the cause before hearing.

Parol agreement to convey lands: Specific performance. Where under a parol agreement to convey land the purchase money had been paid, possession taken and valuable improvements made, these acts of part performance were held to be sufficient to take the case out of the statute of frauds, and to entitle the purchaser to a decree for specific performance. (b.)

Inadequacy of price, effect of on specific performance. Inadequacy of price, where it is so gross and palpable as of itself to appear evidence of actual fraud, may be sufficient to induce the court to stay the exercise of its discretionary power to enforce a specific performance, and leave a party to his remedy at law; but inadequacy of price *merely*, without being such as to prove fraud conclusively, is not a good objection to specific performance. (c.)

The bill in this case was filed for the specific performance of a contract for the sale of real estate.

The bill charged that Robert Hogge, the husband of defendant Hannah Hogge (who was now dead), in May, 1832, was seized and possessed of an undivided interest, to the extent of seven and a half acres, in a certain tract of ninety-one acres, situated at the mouth of Black river, in St. Clair county; that on May 25, 1832, he agreed to sell to complainant seven acres of his said land, for the consideration of \$150; that in June and July following, in

(a.)—It is improper for a master in chancery to perform any official act as master in a cause in which he is solicitor or partner of the solicitor. *Brown v. Byrne*, Wal. Ch., 463.

(b.)—See *Bomier v. Caldwell*, *post*, 65; same case on appeal, 8 Mich., 463; *Norris v. Showerman*, 2 Doug. Mich., 16. Delivery of possession is an act of part performance. *Weed v. Terry*, Wal. Ch., 501; same case on appeal, 2 Doug. Mich., 344. But such possession cannot avail the complainant where it is sufficiently explained by

Burtch v. Hogge.

various sums, and at different times, complainant paid to said Robert Hogge \$129 of said consideration, for which said Robert gave his receipts, and put said complainant in possession of said premises; that complainant had made improvements on the premises to the amount of \$1,500 and upwards, and had kept possession of said premises ever since; that some time in the month of May aforesaid, complainant procured a deed to be made out from Hogge to him of the land, but in August thereafter, and before the deed was executed, Hogge was taken suddenly ill and died intestate, leaving the defendant, Hannah, his widow, and other defendants named, his heirs at law, * to inherit his 32 estate; that his wife administered, and the balance of the purchase money was paid to her, and she acknowledged satisfaction and gave receipts therefor, and said she felt desirous and willing to convey the legal title to the lot, if authorized so to do.

And the bill prayed that defendants be compelled specifically to perform said agreement, by executing a conveyance of the premises to complainant.

other relations between the parties, and cannot be unequivocally referred to the agreement of purchase. *Jones v. Tyler*, 6 Mich., 364; *Story Eq. Juris.*, § 762, and cases cited.

The parol contract, in order to be enforced, must be certain in all its essential particulars. *McMurtrie v. Bennette*, *post*, 124; *Millard v. Ramsdell*, *post*, 373; *Bomler v. Caldwell*, 8 Mich., 463. It must also be mutual. *McMurtrie v. Bennette*, *post*, 124; *Hawley v. Sheldon*, *post*, 420. It must be proved in the clearest manner, and be substantially the same set forth in the bill. *Wilson v. Wilson*, 6 Mich., 9. And the bill must set out the special facts relied upon as showing part performance, to take the case out of the statute of frauds. *Bomler v. Caldwell*, 8 Mich., 463. As to what is material in such a contract, see the case last cited. And as to waiver by the vendor of laches in performance on the part of the vendee, see *Hunt v. Thorne*, 2 Mich., 213; *Ingersoll v. Horton*, 7 Mich., 405.

(c.)—See *Hunt v. Thorne*, 2 Mich., 213; *Wallace v. Pidge*, 4 Mich., 570.

The specific performance of contracts always rests in the sound discretion of the court, to be decreed or not as shall seem just and equitable under the peculiar circumstances of each case. *Smith v. Lawrence*, 15 Mich., 499; *McMurtrie v. Bennette*, *post*, 124. It will not be decreed where the contract is unequal and gives the complainant an unfair advantage. *Chambers v. Livermore*, 15 Mich., 381; nor will it be decreed in favor of a complainant who has laid by without performance on his part until there has been such a change in the value of the property as to render the contract unequal if made now. *Smith v. Lawrence*, 15 Mich., 499.

Burtch v. Hogge.

John Nolan was joined as a defendant, and he answered, stating that he had been appointed administrator *de bonis non* of the estate of Robert Hogge; that he had no personal knowledge of the matters stated and charged in the bill, and claimed the benefit of the statute of frauds. The heirs at law, who were minors, interposed the usual *pro forma* answer by their guardian *ad litem*.

Hannah Hogge, the widow, answered, admitting that her husband was seized of the land, as alleged in the bill; neither admitting nor denying the contract of sale set forth in the bill, but denying all knowledge of its terms; admitting the payment of money to her husband and herself, as set forth in the bill, and the giving of receipts therefor, but claiming the benefit of the statute of frauds. She also denied that, on her part, she had ever agreed to release her right of dower.

General replication was filed to these answers, and an order entered for the taking of testimony before a special commissioner. Testimony having been taken under this order on the 16th, 17th and 18th days of September, 1835, and the same having been returned and filed,

Woodbridge and Backus, on behalf of the minor heirs, now moved to suppress the depositions taken on the first two days for irregularity.

33 * It appeared from the certificate of Horatio James, the special commissioner appointed to take the testimony, that several witnesses appeared before him, at his office in St. Clair, on the part of the complainant, and that Ira Porter, Esq., appeared as counsel for the complainant, and put questions generally to the witnesses, and took down, in his own handwriting, all the answers given to such questions by the witnesses, and reduced to writing all the depositions taken; that neither the defendants, their agent or attorney, were present at the examination until all the witnesses had testified; that he had frequent occasions to leave the room, and was not present all the time during the examination; that he only administered the oaths to the witnesses after their depositions were fully written by Mr. Porter.

Burtch v. Hogge.

The affidavit of John Thorn stated that he was present at the taking of the depositions in question, and that Ira Porter put all the questions to the witnesses, and wrote all the depositions; that Porter appeared to act as the attorney for Burtch, the complainant, in taking the testimony.

Ira Porter states in his affidavit that some time in the summer of 1835, Burtch, the complainant, informed him that depositions were to be taken at Palmer before Horatio James, a special commissioner appointed for that purpose, to be used upon the trial of a cause pending in chancery, wherein he was complainant, and Hannah Hogge and others were defendants; that Burtch wished him to testify in the matter, and that he, Porter, agreed to attend as a witness; that Burtch requested him to see something to the inclosing and transmitting of the testimony to Detroit, but did not employ him as counsel or attorney; that he was not at that time an attorney in this State or elsewhere; that at the solicitation of James, the commissioner, he wrote his own deposition and those of several other witnesses then in attendance; that John Doran, who appeared to be interested in the matter, either as one of the parties or as their agent, was present, and did not object to his writing the depositions; that the depositions were written by him truly and faithfully, and were read to, and approved of by the * witnesses, and that he had no interest in the 34 event of the cause.

H. T. Backus, in support of the motion.

A. D. Frazer, contra.

THE CHANCELLOR. There can be no doubt that the conduct of the commissioner in taking these depositions was highly improper.

Thorn, in his affidavit, states that Porter appeared as attorney, asked all the questions and wrote the depositions, and it is apparent that he appeared there on different days, and when he was not called there as a witness.

Porter himself says in his affidavit he was requested by Burtch

Burtch v. Hogge.

to see to the inclosing and transmitting the testimony to Detroit; he says he was not employed as counsel or attorney, and adds that he was not admitted as an attorney in this State or elsewhere at the time; but he does not deny that he was acting as the agent of Burtch, and he states that he wrote his own deposition and several others.

The certificate of James, the commissioner, although, perhaps, irregular, yet if looked into would not lead the court to place much confidence in the faithful execution of his duty as a commissioner. He says in his certificate that he was absent from the room a part of the time during the examination of the witnesses and the writing of the depositions. The proceedings in taking these depositions were clearly irregular. (See 2 *Chan. Rep.*, 399; *Hind's Ch.*, 344, 348; 15 *Ves.*, 380.)

But it is urged that the irregularities in taking the depositions are waived by the defendants having taken further steps in the cause; and the case of *Skinner v. Dayton*, 5 *Johns. Ch.*, 191, is relied on as authority to support this position. That was

35 a case where the notice to take testimony was * claimed to be insufficient; no want of fairness in the execution of the commission was complained of, and three terms had been suffered to elapse after notice to take testimony had been given. An offer to cure the defect of notice had been made and declined, and the cross-examination of the witness had been expressly waived. This was a very different case from the one now under consideration.

The case cited in 3 *Brown*, 620, was a case on appeal, and the depositions had been used at the hearing in the court below. In the case of 1 *Peters*, 307, the deposition had been read without objection at the hearing; but the judge in that case says: "If the objection had been made to the admission of the deposition at the hearing, it ought not to have prevailed, because the opposite party appeared and cross-examined the witness." In this case it was a question of regularity merely, and there was no pretense of impropriety or unfairness in taking the deposition.

Burtch v. Hogge.

Courts have always looked with jealousy upon proceedings of this kind, and guarded with great care the rights of the parties against imposition and fraud; and under our practice, where depositions are generally taken without interrogatories being filed, it seems almost indispensable to the ends of justice that this court should scrutinize well the proceedings in taking depositions before it permits them to be read as evidence. I should feel great reluctance in deciding this case upon testimony taken as loosely as this seems to have been.

In *3 Att.*, 812, although the affidavits had been read, the court, for the reason that the depositions had been unfairly taken, and for other reasons there appearing, dismissed the proceeding with costs, to come out of the pocket of the solicitor who had unfairly taken the depositions.

It seems that courts of equity do take notice of errors of the kind here complained of, at any stage of the proceedings in the cause before hearing.

The depositions taken in this case must be suppressed.

But as in the case of *Shaw v. Lindsay*, 15 *Ves.*, 384, if it should happen that the witnesses could not be examined again, * this order does not go to the length of preventing 36 the court's directing hereafter that the depositions may be opened if necessity should require the rule to be dispensed with.

Depositions suppressed.

A new order was obtained to take testimony, and the testimony having been taken and returned, the cause came on for final hearing.

A. D. Frazer for complainant.

Inadequacy of price, unless it amounts to conclusive evidence of fraud, is not of itself sufficient ground for refusing a specific performance. Although this was the case of an auction sale, the opinion was pronounced on the general doctrine. (*Hatch v. Hatch*, 9 *Ves.*, 292.)

In another case it was expressly "held on a bill for specific

Burtch v. Hogge.

performance, that if the parties bargained with their eyes open, and without imposition or surprise, mere inadequacy of price was not of itself sufficient to prevent the court from administering its usual equity." (*Colyer v. Brown*, 1 Cox, 428.)

This, say the court of errors in the State of New York in a similar case, "is the doctrine of common sense and common honesty, for it may be asked with propriety, what right have we to sport with the contracts of parties fairly and deliberately entered into, to prevent them from being carried into effect?" The court further say: "Much property is held by contract, purchases are constantly made on speculation, the value of real estate is constantly fluctuating, and in such matters there most generally exists an honest difference of opinion in regard to any bargain, as to its being a beneficial one or not. To say, when all is fair, and the parties deal on equal terms, that a court of equity will not interfere, does not appear to me to be supported by authority." (*Seymour v. Delancy*, 3 Cowen, 532; *King v. Hamilton*, 4 Peters, 328; *Day v. Newman*, 2 Cox, 77; *Willan v. Willan*, 16 Ves. 83.)

37 * *Woodbridge and Backus*, for defendants.

H. T. Backus.

The specific execution of agreements in a court of chancery, is not *ex debito justitiæ*. (*Attorney-General v. Day*, 1 Ves., 219.) But a bill for the specific performance of an agreement (even where the agreement is in writing), is addressed to the sound discretion of the court, in the exercise of its jurisdiction. (*Seymour v. Delancy*, 6 Johns Ch., 222.) If its specific performance is refused, the party loses no right, for the only remedy to which the party has a right, is his remedy at law for damages for the breach of contract.

An agreement (even in writing) must be certain, specific, mutual, and for an adequate consideration to be specifically performed. (1 *Mad. Ch.*, 423; *Parkhurst v. Van Cortland*, 1 Johns Ch., 273; *Benedict v. Lynch*, *Id.*, 370.) Where the agreement is uncertain, the court will refuse a specific performance (1

Burtch v. Hogge.

Mad. Ch., 426; 2 *Sch. and Lef.*, 7, 553; *Newland on Con.*, 151; *Brownly v. Zeffrees*, 2 *Vern.*, 415.) Where there is any doubt as to the identity of the lands to which a contract relates, a court of equity ought not to decree a specific performance. (*Graham v. Henessen*, 5 *Munf.*, 185; *Calverly v. Williams*, 1 *Ves.*, 210.) A contract must be so precise that neither party can misunderstand it, or it will not be specifically performed by chancery, but the parties will be left to their remedies at law. (*Colson v. Thompson*, 2 *Wheat.*, 336.)

Inadequacy of consideration (even in the absence of all fraud) is a sufficient reason for refusing a specific performance, for an agreement must be just and fair in *all* its parts, otherwise a specific performance will not be decreed. (*Seymour v. Delancy*, 6 *Johns. Ch.*, 222; *Cletheral v. Ogilvie*, 1 *Dessauss.*, 275.) A court of chancery will refuse a specific performance where the price of sale is very low. (1 *Mad. Ch.*, 425; 3 *Brown C. C.*, 228; 2 *Cox*, 77; *Newland on Contracts*, 66; 10 *Ves.*, 592; 1 *Ves.*, 279; *Fonb. Eq.*, 234; 3 *Ves. and Bea.*, 192-3.) Even a contract will be rescinded and conveyance set aside for inadequacy of consideration. (*Sugd. on Vend.*, 170, 171; *2 *Brown C. C.*, 38 150; 1 *Vern.*, 465; 1 *Brown C. C.*, 176; 6 *Johns. Ch.*, 222.) Inadequacy of price is often (even in the absence of all fraud) the ground of refusing a decree for specific performance, though not sufficient of itself to induce the court to set aside an executed agreement, but the court will leave the parties to their remedy at law. (*Osgood v. Franklin*, 2 *Johns. Ch.*, 23; 14 *Johns.*, 527; 1 *Vern.*, 472; *Awbry v. Keen*, *Chan. Cas.*, 19; 1 *Dessauss.*, 250.) Nor will a court of chancery decree a specific performance against a widow entitled to dower. (*Sugd. on Vend.*, 142.)

But where an agreement is certain and for an adequate consideration, to be specifically performed by the decree of a court of chancery, it must be in accordance to the forms prescribed by law. (1 *Mad. Ch.*, 372; 3 *Ves.*, 420; 3 *Atk.*, 385; 1 *Ves.*, 279; 1 *Eden.*, 323.) The statute requires all agreements touching

Burtch v. Hogge.

lands to be in writing. In this, equity follows the law. A letter or receipt may be sufficient writing within the statute; but it must specify all the terms of the contract. The most trifling omission is fatal (*Sugd. on Vend.*, 45, 48); for an agreement cannot rest partly in writing and partly in parol. (1 *Johns. Ch.*, 131, 272.) It is insisted that the case in hand is taken out of the operation of the statute by part performance; this exception (of part performance) to the operation of the statute is viewed with extreme jealousy, and properly so, by courts, as tending to relax a salutary rule of law, and open a door for all the frauds the statute was intended to guard against. (*Foster v. Hale*, 3 *Ves.*, 712, 382.) Part or full payment of the purchase money (even on full and distinct proof of parol agreement) is not such a compliance with the spirit of the statute as a court of chancery will recognize and carry into execution. (1 *Mad. Ch.*, 381; 2 *Des.*, 190; *Lord Pangall v. Ross*, 2 *Eq. Ab.*, 46; *Leah v. Morris*, 2 *C. C.*, 135; *Lord Redesdale's remarks in Clenan v. Cook*, 1 *Sch. and Lef.*, 40,) where he says, payment of purchase money will in no case amount to a part performance, nor 39 will giving directions for *conveyances, deeding estate, etc., take a case out of the statute. (*Clark v. Wright*, 1 *Atk.*, 12; *Whaley v. Bagnall*, 6 *Brown C. C.*, 45; *Gwins v. Calder*, 2 *Dessauss.*, 190.)

To take a case out of the operation of the statute on the ground of part performance, the existence of the contract as laid in the bill must be made out by clear and unequivocal proof, and the acts of part performance must be of the identical agreement set up. (*Phelps v. Thompson*, 1 *Johns. Ch.*, 131, 149.) It is not sufficient that the act is evidence of some agreement, but it must show unequivocally, the existence of the particular agreement set forth in the bill, and that that very agreement was in part executed. (*Lindsay v. Lynch*, 2 *Sch. and Lef.*, 8.)

W. Woodbridge.—Certainty in a contract is essential; if uncertain, a specific execution will be refused. (1 *Johns. Ch.*, 273, 131;

Burtch v. Hogge.

14 *Johns.*, 15; 7 *Johns. Ch.*, 13; 1 *Mad.*, 336-7; 1 *Vern.*, 406; 5 *Munf.*, 185.)

Equity will not compel a specific execution, unless when essential to justice. (*Mif. Pl.*, 119.) A hard bargain merely, therefore, will not be opened, especially as to infant heirs.

"Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the statute was intended to guard.

"The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion." (4 *Cranch*, 224; 2 *Peters' Cond. Rep.*, 96; 1 *Mad.*, 302-3; 3 *Ves.*, 712; 6 *Ves.*, 32, 37; 5 *Munf.*, 185, 318.) In such cases the complainant should be left to seek his remedy at law. (1 *Wheat.*, 197.)

Part performance implies a fraud on the opposite party. (See *Story's Eq.*, 66, 74; 1 *Johns. Ch.*, 149.) Payment is no part performance. (2 *Story's Eq.*, 64-5; 5 *Munf.*, 317.)

THE CHANCELLOR.—The bill in this case is filed to compel *the specific performance of a special contract to convey land. Two questions arise for the consideration of the court.

First. Has there been such a contract proved as will enable this court to decree a specific performance? and,

Second. Has there been such a part performance as will take the case out of the statute of frauds?

That there was an agreement or contract for the sale of some portion of or interest in the McNiel tract (so-called) at the mouth of Black river, in St. Clair county, by Robert Hogge to Jonathan Burtch, cannot admit of a doubt. Several receipts have been produced by Burtch, in which Hogge acknowledges the receipt of money to apply as payments on the land sold by him to Burtch. Although these written receipts do not show what the

Burtch v. Hogge.

contract was, they are evidence of some contract between the parties respecting the sale and purchase of land ; and it is pretty clearly shown by Hogge's acknowledgments that he had sold to Burtch his undivided interest of between seven and eight acres of land in the Mc Niel tract (reserving to himself one-half acre), for the sum of \$150.

Testimony on the part of the complainant.

William H. Carleton states that he "heard Hogge say, in 1832, that he had sold all his lands at the mouth of Black river, except half an acre, to Burtch, who had pretty much paid all up for the same." Previous to this heard Hogge saying "that he had bought, at the mouth of Black river, seven acres, or seven acres and some hundredths of an acre.

Harman Chamberlain states that he received \$45 from Burtch in July, 1832, to pay to Hogge for land purchased by Burtch formerly from Hogge, which he paid accordingly. Proves the execution of Hogge's receipt for \$85 ; also a receipt for \$36, and two receipts for \$23, by Hannah Hogge. Heard Hogge say "that he had sold a part of his interest in his lands at Black river, about seven acres, to Burtch ; understood it to be of the lands purchased by him from E. P. Hastings. This was in the fall or winter of 1831." That Burtch was in possession before the death of Hogge ; that Burtch has erected upon said land, since the death of Hogge, a store, tavern-house and one

41 *barn, the value of which he believes to be about \$2,500, and were erected from four to five years since ; that Hannah Hogge asked him whether she had a right or ought to give a deed to Burtch of the land, she being the administratrix ; that Hogge's deed was given to Burtch to take to Detroit to have the necessary papers made out to obtain a deed ; that Burtch has continued in possession where he built ever since ; that Hogge, when he purchased of Hastings, supposed that he had purchased 30 acres, and was then ignorant of the Masten claim ; understood that the sale from Hogge to Burtch consisted of seven acres, and that it was an undivided interest ; estimates the seven acres in

Burtch v. Hogge.

1831 at \$500; considered Hogge an intelligent man, and as capable of estimating the worth of property as most men.

Israel Carleton testifies that Hogge told him that he had purchased a part of the McNiel tract, in company with a Mr. Sales; has heard him say that he sold his interest, except half an acre, to Burtch, and had made about \$90 in the trade; heard him say this in various conversations in 1832; the lands referred to are near the mouth of Black river; testifies to the payment of \$40 on the purchase, and proves the receipts of Robert and Hannah Hogge; that the land sold to Burtch by Hogge was an undivided interest, reserving half an acre.

Edmund Carleton says, that in the summer of 1832, in conversation with Hogge respecting a payment to be made by him and Hogge jointly, Hogge stated that he expected to receive \$80 or \$90 from Burtch, in part payment for some lands sold him at the mouth of Black river; said that the lands were undivided, that he (Hogge) had reserved half an acre.

Ira Porter testifies that he heard Hogge speak of his purchase in December, 1831; that the interest was an undivided interest, and purchased jointly with Edward Sales, and was a portion of the McNiel tract, situated at the mouth of Black river. Some time in January or February, or thereabout, of 1832, Hogge, in conversation with Harrington and others, said that he had sold out his interest in the McNiel tract to Burtch, *reserv- 42
ing half an acre, for \$140 or \$150; in the spring of 1832, Hogge requested him (Porter) to make out a conveyance, and he did so accordingly, and gave it to Hogge; it was prepared in exact accordance with Hogge's instructions, and was read to him, and no fault found with it; he paid witness for drawing it; estimates the value of improvements made by Burtch and his assignees, between the date of the purchase and the commencement of this suit, at between \$1,800 and \$2,500; Burtch and his assigns have been in possession ever since the purchase; thinks the white store was erected after the date of the deed; Burtch rented to Sampson.

Burtch v. Hogge.

John S. Heath says that in June or July, 1832, he had a conversation with Robert Hogge, who then told him that he had formerly an interest in six or seven acres of land at the mouth of Black river, but had sold the same to Burtch, reserving half an acre.

Jeremiah Harrington testifies that in the year 1832 Robert Hogge told him that he had sold to Burtch all but half an acre of the land which he had bought in the McNiel tract, and had received his pay in full for it; it was from seven to eight acres; had two conversations with Hogge, in which he said the same thing.

Jacob Miller states that in 1832 he had a conversation with Hogge about the purchase of half an acre of land. Hogge told him he had sold to Burtch his land in the McNiel tract, reserving half an acre; thinks it was seven acres which Hogge said he had sold; Hogge said he had received some part of his pay; had more than one conversation with him on the subject, one of which was in May, 1832; knows that Burtch was in possession of *some part* of the McNiel tract a year before this conversation.

John Thorn states that Robert Hogge called upon him to make out a deed to Burtch for some portion of the McNiel tract, and had his papers with him. It was some certain interest with the reservation of half an acre; Hogge refused to leave the

43 papers on account of the price the witness would *charge for making the deed; Hogge's deed was from Eurotas P. Hastings, who derived title from Sibley and Kearsley.

Defendant's witness:

John Thorn testifies that he had a conversation with Hogge in 1831 or 1832, about making out a deed from him to Burtch, for some certain interest which he had sold to Burtch in the McNiel tract, at the mouth of Black river; it was an undivided interest which Hogge wished to convey; that Hogge produced the patent to Solomon Sibley, and a transfer by Sibley, and also by Jonathan Kearsley as the administrator of the estate of Edward Prucell, to

Burtch v. Hogge.

E. P. Hastings, and a transfer from Hastings and wife to Hogge; that he (Thorn) could not understand from Hogge how much interest he wished to convey to Burtch; that Hogge intended to reserve something more than half an acre; that Hogge gave him to understand that the reservation which he wished to make was subject to litigation, for the reason that he (Hogge) had been induced to believe, by those of whom he purchased, that he had purchased a sixth instead of a third part; that he (Thorn) advised Hogge that it appeared from his papers that he had purchased a third instead of a sixth part; that he (Thorn) did not make out the deed, in consequence of the uncertainty of the amount of interest to be conveyed, and the price which he charged for making the proper investigation and the deed; that Burtch was living on the McNiel tract previous to Hogge's purchasing any interest therein; that he estimates the value of the land in the McNiel tract, in 1832, with a clear title, at \$10 per acre; at this time, \$500 per acre.

On his cross-examination says: the original patent of the McNiel tract, containing about 90 acres, was to Solomon Sibley; it appeared by the papers shown by Hogge that Sibley purchased for himself and two others; that one of them was Edward Prucell; that Prucell's interest appeared to have been sold to E. P. Hastings by Kearsley, who was Prucell's administrator; that Sibley's interest also had been sold to Hastings; that Hogge derived his title through Hastings; that after Hogge had purchased Prucell's third, as he supposed, *and paid his 44 money therefor, those from whom he had purchased endeavored to persuade him that he had purchased only a sixth instead of a third; Hogge said the reason given by the persons from whom he derived title, why he had not purchased a third, was that Prucell had sold a part of his interest to Masten; that he (Thorn) saw the original articles of agreement between Prucell and Masten, at Gen. Larned's office, in Detroit, subsequently to Hogge's purchase; that he believes the articles were signed by both Prucell and Masten; it was an agreement to convey half of

Burtch v. Hogge.

Prucell's interest in the McNiel tract, and the one-half of other lands.

It is proven by several witnesses that Hogge, in his lifetime, stated that he had sold about seven acres; and nearly all the witnesses speak of this as the quantity, reserving to himself half an acre.

Thorn says that he did not understand what the interest was which was reserved; that it was half an acre and something more, and that it was subject to litigation. I think Thorn's deposition, together with the testimony of the other witnesses, explains the difficulty.

It appears that nearly all the witnesses understood the interest sold to have been seven acres. From the deposition of Israel Carleton it appears that the purchase was made by Hogge and a Mr. Sales; from the deposition of Mr. Thorn, that it was a matter of doubt and dispute whether they had purchased the one-third or one-sixth. They at first supposed it to have been one-third, but it afterwards appeared that there was an outstanding contract, made by Prucell, to convey one-half of his interest to a man by the name of Masten. This, I think, explains the seeming discrepancy, and shows clearly the understanding of the witnesses that the interest which was to be conveyed was seven acres, and that the reservation was to be something more than the half acre, and that it was subject to litigation. And Hogge's objection to signing the deed is also explained.

It is hardly possible that so many witnesses can be mistaken as to the amount of interest to be conveyed. It is apparent

45 to *my mind that Hogge intended to convey to Burtch the seven acres; to reserve to himself all the right which he had to the other sixth, claimed by Masten. The land containing ninety-one acres and forty-one hundredths, it seems by the testimony, was originally divided into three shares, making thirty-one acres and forty-six hundredths each. One-half of this share, which was asserted to belong to Hogge, as appears by Thorn's deposition, had been contracted to Masten by Prucell, which

Burtch v. Hogge.

would leave, if the contract should prove a valid one, fifteen acres and twenty-three hundredths as the part belonging to the estate of Prucell. This, it appears, was purchased by Hogge and Sales together. This, then, would leave, without reference to the disputed one-sixth, alleged to have been contracted to Masten, the seven acres testified to by the witnesses, and the reservation of the half acre and a small fraction over to Hogge. And this substantially and satisfactorily explains the whole of the evidence.

From all the evidence in the case, I think it clear that Hogge had sold his undivided interest of seven acres in the McNiel tract to Burtch, reserving to himself all over the seven acres, supposing it to be about a half an acre.

1
Second, As to the part performance.

It appears clearly by the proofs in this case, that a principal part of the purchase money was paid to Hogge in his lifetime, and that the balance was paid to Hannah Hogge, his widow, who was administratrix of his estate, soon after his death.

The question whether the payment of the purchase money is such a part performance of a parol contract to convey land as will take it out of the statute of frauds, seems to be as yet unsettled. But the case does not turn on this point alone. It has been proved that Burtch was in possession of a portion of the McNiel tract at the time he purchased of Hogge, and that he has ever since remained in possession; that he had made valuable improvements on the same after his purchase from Hogge, and before the commencement of this suit; that these improvements were worth from \$1,800 to \$2,500.

There is some doubt, perhaps, as to the time some portion *of the improvements were made; but that the 46 most valuable and expensive were made after the purchase by Burtch from Hogge there can be no doubt.

The payment of the purchase money, the possession, and the improvements made by Burtch since the purchase, I think, are clearly sufficient to take this case out of the statute of frauds.

Burtch v. Hogge.

It has been urged that there was such an inadequacy of price that this court will not decree a specific performance.

Inadequacy of price, where it is so gross and palpable as of itself to afford evidence of actual fraud, may be sufficient to induce this court to stay the exercise of its discretionary power to enforce a specific performance, and leave the party to his remedy at law; but inadequacy of price *merely*, without being such as to prove fraud conclusively, is not a good objection against decreeing a specific performance. (See *Seymour v. Delancy, on appeal*, 3 Cowen, 445, where all the authorities upon this subject are collected.)

The value must be taken at the time the contract was made.

There is some discrepancy in the testimony as to the value of the land at that time. Chamberlain, in his testimony, estimates its value in 1831 at \$500. Thorn, in his deposition taken by the defendants, estimates the lands in this tract in 1832, with a clear title, at \$10 per acre, making \$70 for the seven acres. The price agreed upon was \$150. Where witnesses vary so much, with equal opportunities of judging, it would certainly be going very far for this court to come to the conclusion that there is any such inadequacy in the price, which the parties themselves have agreed upon, as to amount to fraud, when it appears too that

Hogge sold at an advance, although he only retained the
47 lands from December to May following. *The prayer of the bill must be granted or refused. Here is payment for the lands, all the possession of which the subject matter was capable, and an expenditure, according to the testimony of Chamberlain, of \$2,500, and according to Porter's deposition, of of from \$1,800 to \$2,500.

The fact that the lands on which the improvements were made were undivided, would perhaps be entitled to some consideration. But it is not to be believed that Burtch made these expensive improvements without reference to his interest in the lands, relying upon obtaining an allowance therefor on a division with the other owners. There may be some doubt as to whether the

Burtch v. Hogge.

eleven-hundredths over the half acre were to be retained by Hogge, or conveyed to Burtch. But the witnesses most of them designate the quantity at seven acres, and as the remainder would be so near the half acre, it would naturally be mentioned as a half acre.

The decree must be for a conveyance of Hogge's undivided interest in the McNiel tract, of seven acres, to the complainant, reserving to the heirs and legal representatives of Hogge all other right, title and interest which they may have in said tract, and without prejudice to the right of dower therein of Hannah Doran, late Hannah Hogge. (b.)

(b.)—Mrs. Hogge in this case appears to have been made defendant on the ground of having, as administratrix, received payment of part of the purchase price. In *Richmond v. Robinson*, 12 Mich., 193, it was held (following *Weed v. Terry*, 2 Doug. Mich., 344), that the wife cannot be compelled to release her dower in lands which her husband has contracted to sell, and that she is not a proper party to a bill by the purchaser for specific performance.

Disbrow v. Jones.

Henry V. Disbrow v. DeGarmo Jones and others.

Possession of lands constructive notice of equities. The possession of a tenant is notice to a purchaser of the actual interest the tenant may have in the premises. (a.)

Cotemporaneous contracts. Where several papers are executed between the same parties cotemporaneously, and relate to the same subject matter, they are regarded as together constituting one and the same transaction. (b.)

Insurance is a personal contract, and does not pass to a purchaser by a conveyance of the property insured. (c.)

Foreclosure for one installment. Equity will not interfere to prevent the mortgagee selling, under the power of sale, the whole of the mortgaged premises for a single installment, when it appears that they cannot be sold in parcels without injury to the whole.

Purchaser subject to mortgage cannot contest it. One who buys land and receives a conveyance subject to a mortgage thereon, cannot afterwards contest the validity of the mortgage on the ground of defect in the formalities of execution.

Motion to dissolve an injunction. The facts, as they appeared by the bill and answers, may be shortly stated as follows :

February 1, 1832, the defendant (Jones), being the owner of a lot in the city of Detroit with a warehouse thereon, leased the same to John L. Whiting and John J. Deming for a term of five years, at the yearly rent of \$600. The lessees agreed to keep the warehouse insured for not less than \$2,500 for the benefit of Jones, and Jones covenanted that in the event the warehouse

(a.)—When a party purchases lands which are in the possession of a third person, he takes them subject to all equities existing in favor of the occupant as against his vendor. *Rood v. Chapin*, Wal. Ch., 79; *Godfroy v. Disbrow*, Wal. Ch., 280; *McKee v. Wilcox*, 11 Mich., 388; *Norris v. Showerman*, 2 Doug. Mich., 16. But the continuous possession of a grantor after giving a deed is no notice to a purchaser that he claims equities in opposition to his conveyance. *Bloomer v. Henderson*, 8 Mich., 395.

(b.)—Compare *Bronson v. Green*, Wal. Ch., 56; *Norris v. Hill*, 1 Mich., 202; *Dudgeon v. Haggart*, 17 Mich., 275.

(c.)—Nor can a trespasser in whose hands the property is accidentally destroyed, avail himself of a recovery of the insurance moneys by the owner, to reduce the recovery of damages against him for his trespass. *Perrott v. Shearer*, 17 Mich., 48.

1h 49
1h 108
1h 104
6 321
2 324

Disbrow v. Jones.

should be destroyed from hazards contemplated by the policy, he would rebuild within six months thereafter. September 10, 1834, Jones indorsed upon the lease an agreement to extend it for two years longer, for an additional sum of not exceeding \$200 a year.

April 27, 1836, Jones sold the premises to Augustus Garrett, Daniel B. Brown, Nathaniel J. Brown, William R. Thompson, and George W. Hoffman, for \$20,000, and conveyed the same by deed, with covenants of seisin and against incumbrances, taking back a mortgage on the premises for \$16,000 of the purchase price. At the same time Jones entered into an agreement with his vendees, reciting the extension of the term to Whiting (who had bought out Deming, and was then in possession of the premises, and so continued to be until the bill was filed) and stipulating that *until possession should be given up by 49 Whiting, Jones should pay his vendees interest on the \$20,000 in lieu of the rents for that time; and the rent was to be received by the vendees up to February 1, 1837. Whiting, it appeared, was at this time applied to by the parties to see if he would give up possession at the end of the five years, and declined to do so, expressing his intention to hold for the full term, as extended.

Soon after the purchase Garrett and the Browns sold and conveyed their interest to Thompson, and afterwards, on October 21, 1836, Thompson sold and conveyed all his interest to Disbrow.

December 7, 1837, Whiting caused the warehouse to be insured in his own name, but for the benefit of Jones, against loss by fire, in the sum of \$2,500, in fulfillment of his covenant in the lease. The next April the warehouse was destroyed by fire. No payment had then been made on the mortgage to Jones. The insurer was ready to pay the amount of his policy to Whiting, but Disbrow claimed three-fourths thereof, and alleged in the bill an offer to pay three-fourths of the amount of the mortgage to Jones if Jones would stipulate to give him possession, and to rebuild the warehouse within a reasonable time, and give him

Disbrow v. Jones.

three-fourths of the insurance money. This offer was denied by the answer of Jones.

50 *April 29, 1837, one installment of the mortgage to Jones being due and unpaid, he proceeded to foreclose under the power of sale. Disbrow then filed his bill, alleging that the whole of the premises had been advertised for sale by Jones for the first installment, and insisting that it was not competent to advertise and sell more than was necessary to pay the amount then due. He also alleged the mortgage to be defectively executed, there being but one subscribing witness to the execution by the Browns; and he prayed for an injunction to restrain the insurance company from paying over the money, and to inhibit and enjoin Jones from proceeding to foreclose under his notice, and that Thompson be decreed to vest in complainant a
51 more perfect title to the premises, or *that the sale from Thompson to complainant might be set aside, and he be decreed to repay the purchase money, etc.

The answers showed that the mortgaged property was so situated that it could not be sold in parcels without injury to the whole.

A preliminary injunction having been granted, motion was now made to dissolve the same.

D. Goodwin and T. Romeyn for the motion.

Woodbridge & Backus contra.

55 *THE CHANCELLOR.—In the argument of this motion it has been urged on the part of the complainant that Jones, having put it in the power of his vendees to commit a fraud upon the complainants, is responsible for the consequences.

I am unable to see anything in this case to authorize this position in the argument. There is no showing that goes to charge Jones with fraud.

At the time of the execution and delivery of the conveyance by Jones to Thompson and others, Whiting was in possession and occupied the premises under the lease from Jones, and the

Disbrow v. Jones.

vendees all knew that fact. Whiting was applied to at the same time to learn whether he wished or intended to occupy the premises the full term to which the lease had been extended (to February 1, 1839), and he replied that he did, and this fact was also communicated to the vendees of Jones.

There is, therefore, not only the absence of fraud on the part of Jones in this respect, but Whiting's right to occupy formed the subject of a positive agreement between Jones and his vendees.

The deed by Jones, the bond and mortgage on the premises by his vendees, and an instrument or agreement reciting and recognizing Whiting's unexpired term, and his right to occupy under the lease, signed by all the vendees, were all executed and delivered at the same time; each of these instruments, therefore, must be regarded as a part of, and as constituting one and the same transaction. The vendees of Jones have *nothing 56 to complain of, for Whiting was in possession when they purchased, and their right to possession was subject, by agreement, to his unexpired term. Disbrow, the complainant, was not an original purchaser from Jones, but derived his title through the vendees of Jones, and clearly they could convey no greater interest than that which they themselves had in the premises.

Whiting was also in possession, and occupied the premises at the time of Disbrow's purchase from Thompson, and Disbrow knew that fact, as he admits in his bill; and there is no principle better settled than that the possession of a tenant is notice to a purchaser of the actual interest the tenant may have in the premises. (*Chesterman v. Gardner*, 5 Johns. Ch., 29; *Daniels v. Davison*, 16 Ves., 249; *Taylor v. Stibbert*, 2 Ves., 437.)

In the case in 4 Hen. & Munf., 120, which has been cited by the complainant, it does not appear that the purchaser had notice that Bibb was in possession before he received the first deed (of February 11, 1790), and this fact, on a careful examination of the case, will be found to form the basis of that decision. In the case of *Grimstone v. Carter*, 3 Paige, 439, I have been able to find nothing conflicting with the rule above stated, but on the

Disbrow v. Jones.

contrary Chancellor Walworth says in that case, that it is the settled law of the land that the possession of premises by a third person is sufficient to put purchasers on inquiry, and to deprive them of the defense of *bona fide* purchasers without notice of his rights.

From the answers of Jones and Whiting in this case, it is clearly to be inferred that Disbrow had, at the time of his purchase, not only notice of the existence and substance, but also of the details of Whiting's lease.

It is, therefore, clear to my mind that when Disbrow purchased the premises of Thompson, he took them not only subject to the mortgage, but also to Whiting's term under the lease.

It is also insisted by the complainant, that the mortgage is defective, there being but one witness to the execution of
57 it *by Garrett and N. J. Brown. To this allegation the defendants answer, that the officer who took the acknowledgment must be considered a subscribing witness. It is not necessary now to decide how far the execution of the mortgage may be considered in compliance with the statute, for if the mortgage were defectively executed in this respect, it could form no ground in the present case for the interference of this court.

The complainant has recognized this mortgage in his purchase, and there is no pretense that the money is not due.

The tender alleged in the bill is not supported by any other evidence, and is positively denied in the answer.

That the whole of the premises are advertised to be sold for the first installment due on the mortgage, furnishes no ground for the interference of this court, as it is shown by the answer that the premises are valuable principally for a wharf and storehouse, and the whole premises have heretofore been used and occupied for that purpose, and cannot be sold separately without injury to the whole.

After a careful examination of the whole matter, I have been irresistibly led to the conclusion that the case does not justify an interference with the policy of insurance.

Disbrow v. Jones.

The insurance is a personal contract, and does not pass with the title of the property insured. This doctrine is clearly laid down in *Ellis on Insurance*, page 72. The language of Lord Chancellor King is there quoted, and he says, in reference to policies of insurance: "these policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment; but they are only special agreements with the persons insuring against such loss or damage as they may sustain." This doctrine is fully recognized, and stated to be the true one in the *Saddlers' Company v. Badcock*, 2 Atk., 554, and in *1 Phillips on Insurance*, 27.

All the decisions I have been able to find conflicting with this principle arise under the builders' act, statute of 14 George III, which empowers the governors or directors of the insurance *offices within certain districts, upon the request of any 58 persons interested in or entitled to any houses or buildings which may be burned down, etc., or upon any grounds of suspicion that the person insured has been guilty of fraud or willfully setting the houses or buildings on fire, to cause the insurance money to be laid out, as far as the same will go, towards rebuilding or repairing the property damaged, etc. Although, therefore, a policy as a personal contract does not pass with the property insured, yet a covenant to insure to a certain amount, entered into by a lessee or other person having an estate in land, is so far beneficial to the property, that in cases to which this statute applies, it will run with the land, and an assignee entitled to the benefits of covenants real may maintain an action on the covenant to insure, if it be not observed. (*Hughes on Insurance*, 392.)

The case of *Vernon v. Smith*, 5 Barn. & Ald., 1, was a case arising under the statute of 14 Geo. III, and the views expressed by *Best, J.*, in that case have not the authority of a decision, and the reasons upon which those views were based do not exist here.

If Jones had no remaining interest or liabilities, the case would present a different aspect. But if the views heretofore taken are

Disbrow v. Jones.

correct, that the execution and delivery of the deed, bond and mortgage, and agreement, were all at the same time, and formed parts of one and the same transaction, and that Disbrow had legal notice of the existence of the lease, it follows that both Whiting and Jones had an insurable interest. Jones is bound to pay \$1,400 per year for the two years, and is bound by his contract with Whiting to rebuild in six months, and Whiting is to pay rent for the two years.

Whether the doctrine of *Best, J.*, in *5 Barn. & Ald.*, be correct or not, it would be going further than any case I have been able to find to interfere by injunction in cases like the present. The legal rights of the parties should be carefully guarded, and seldom interfered with by injunction.

As to whether Jones may not be compelled to apply the insurance money, at or before the expiration of Whiting's term, 59 *need not now be decided. The dissolution of this injunction does not prevent Disbrow's recovery of Jones, if he is liable to him for any portion of the insurance money; and there is no allegation in the bill that Jones is insolvent or unable to pay any amount which may be recovered against him.

Upon the whole, then, Jones seems to have acted fairly, so far, at least, as regards the sale to his vendees. All of the facts in relation to the premises were at that time disclosed by Jones, and Whiting's right to occupy under the lease was made the subject matter of a positive agreement between Jones and his vendees.

Whiting continued to occupy and was in possession when Disbrow purchased from Thompson, and Disbrow knew that fact, and this the law regards as notice to him of Whiting's rights in the premises.

If a fraud has been practiced upon the complainant at all, it is by his immediate vendees, and as against them he has an adequate remedy.

Jones is, therefore, clearly entitled to his remedy to collect his money which is due; he has not been in fault, and it would be unjust to restrain him from doing so. Jones and Whiting had an

Dunham v. Jones.

insurable interest to more than the amount insured, and they have earned the benefits to be derived from the policy, for they have paid the premium on the insurance.

Some other points have been made in the argument, and they have all been carefully considered, and I have been irresistibly led to the conclusion above stated.

This case may be, like the case of *Grimstone v. Carter*, 3 *Puig's Reports*, 439, a hard one; but this court is bound by the rules of law, and whenever courts shall undertake to judge according to the convenience of parties in each case, there is an end to all fixed and settled rules, and the rights of parties will be left to the caprice of whomsoever may occupy the seats of justice at the time. The injunction in this case must be dissolved.

Injunction dissolved.

Goff v. Thompson.

Aaron Goff and Others v. John Thompson and Others.

Consideration: Agreement to support. An agreement by a daughter and her husband to support her father during his natural life, is a sufficient consideration for a conveyance of the father's lands to the daughter.

And after the death of the father, the agreement having been fully performed, the conveyance will not be set aside to give effect to a previous will made by the father, notwithstanding the daughter had attempted, by deed executed by her alone, to reconvey the lands to the father as security for his support.

Deed of married woman void. Such a deed, executed by a married woman without her husband joining with her, is void. (a.)

Bill by the devisees of Richard McCurdy (who was deceased), to set aside a conveyance of land which he had made to Diana Thompson, his daughter, the wife of John Thompson, and
 61 dated September 27, 1834. *The bill charged Thompson and his wife with fraud in procuring said deed, and alleged that afterwards (in December, 1834), on said Richard threatening legal proceedings to set the same aside, said Diana executed, acknowledged and delivered to him a deed to reconvey the same lands, in which deed her husband did not join, but said Richard, who was an ignorant man, received the same, not knowing that the husband's joining therein was necessary; that in the following September said Richard died, leaving a last will, under which complainants claimed, and which had been duly proved.

62 *The bill prayed that the deed to said Diana might be decreed to be void and ordered to be delivered up to be canceled, and that an account might be taken, etc.

63 *The answer fully denied all fraud; averred that the deed to said Diana was given by said Richard at his urgent

(a.)—This rule of the common law was changed by statute in 1855, and since that time a married woman may convey her lands alone, by deed executed and acknowledged in the same manner as if she were unmarried. See *Compiled Laws*, §3292; *Farr v. Sherman*, 11 Mich., 33; *Watson v. Thurber*, *Ibid.*, 467. And husband and wife may convey directly to each other. *Burdens v. Amperse*, 14 Mich., 91.

Golf v. Thompson.

request and solicitation, that in consideration thereof they would receive him into their family and support him during his natural life, which agreement they made and fully performed; and that the deed afterwards executed by said Diana and delivered to said Richard, was executed at the request and for the satisfaction of said Richard, in order to secure to him the support agreed upon, he, the said Richard, having expressed fears that a claim set up by one of the complainants against said John Thompson might otherwise deprive him of the provision he had made for his old age.

*The case was submitted on bill and answer.

66

A. D. Frazer for complainant.

B. F. H. Witherell for defendants.

THE CHANCELLOR.—The consideration for the deed from Richard McCurdy to Diana Thompson was a good and sufficient consideration, and the condition having been performed, there can be no doubt that the title of the defendants, John Thompson and wife, to the land in question is good.

The conduct of the defendants, John and Diana Thompson, seems to have been not only just, but meritorious.

The deed from Diana Thompson to Richard McCurdy is stated in the answer to have been executed as security merely, and having been destroyed or canceled by the grantee, in pursuance of the agreement of the parties, cannot form the foundation of any claim of the present complainants. That deed was also void in itself, it having been executed by a *feme covert* without her husband's joining with her. (See *Sexton v. Pickering*, 3 Rand. R., 468.)

No relief is prayed against Carson McCurdy, the other defendant.

The bill must be dismissed with costs.

Bill dismissed.

Bomier v. Caldwell.

John Bt. Bomier v. Thomas Caldwell.

Specific performance of parol contract: What will take case out of statute of frauds.

Specific performance will be decreed of a parol contract for the conveyance of lands where the vendor has received a considerable portion of the purchase money, caused the land to be surveyed, put the vendee in possession, and allowed him to retain such possession and make valuable improvements, in reliance on the contract, for a series of years: these acts of part performance being sufficient to take the case out of the statute of frauds. (a.)

The bill in this case was filed for a specific performance of a parol contract to convey land.

The bill states that some time in the year 1830 the complainant and defendant entered into an agreement, in and by which the defendant sold to the complainant a certain tract of land situated on Otter creek, in the county of Monroe, being three arpents in front and twenty-five in depth, in consideration of which the complainant was to pay \$150; \$80 of this sum was to be paid immediately in cattle, and the balance in the three years thereafter; that it was understood by the parties that if the complainant found it inconvenient to pay the balance in three years, that then and in such case the defendant was to give further time, and would receive, instead of money, cattle or grain, as might suit the convenience of the complainant.

(a.)—This case is more fully stated and considered on appeal in the Supreme Court, where the opinion was delivered by FLETCHER, CH. J. It is reported in 8 Mich., 463, and the following is the syllabus:

What is material in a contract to convey lands. In a contract for the conveyance of land, the time, place and mode of payment are not considered matters of substance unless by the express stipulation of the parties they are declared to be so, or unless from the special nature of the case, and the necessary intention and understanding between the parties, they must be deemed material. Therefore where on a bill for the specific performance of a parol agreement for the purchase and conveyance of lands the contract as proved varied in these particulars from that set out in the bill, but corresponded in other respects, the variance was held not material.

Party in default will be relieved where it is not unconscientious. Where the parties to an agreement have not expressly stipulated that performance at a particular

Bennier v. Caldwell.

The bill further states that the agreement was not reduced to writing, the complainant having full confidence in the integrity of the defendant; that the defendant caused a survey of the land in question to be made, and put the complainant in the full possession thereof, which possession the complainant has ever since held, and paid the taxes thereon; that the complainant, pursuant to said agreement, did deliver to the defendant cattle valued at \$80; that on the 10th day of July, 1835, the complainant tendered to the defendant the sum of \$94.50, being the balance of the consideration money and interest, which he refused to accept.

time shall be an essential part of the agreement, and where, from the circumstances and nature of the contract, and the situation of the parties, there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced—the conduct of the party in default not being unfair or his claim unconscientious—a court of equity, so far as performance at the time is concerned, will aid the party in default, and decree a specific execution of the agreement as the only adequate measure of equitable justice between the parties.

What part performance will take case out of statute of frauds. Where, under a parol contract for the purchase and conveyance of lands, the vendor had caused the land to be surveyed, received upwards of one-half the purchase price, put the vendee in possession, and had permitted him to retain that possession for several years, in reliance upon the contract, and without taking any steps to put an end to it: *Held*, that these acts of the vendor constituted such a part performance as to take the case out of the operation of the statute of frauds, and entitle the vendee to a specific performance of the agreement.

Bill for specific performance, what it must set forth: Evidence not warranted by allegations must be disregarded. In a bill for the specific performance of a parol contract for the conveyance of land, the general facts relied upon showing a part performance as a ground for taking the case out of the statute of frauds, and for enforcing the agreement, must be specifically set forth. And if evidence is taken in the case of valuable improvements made by complainant on the land in controversy, when there is no allegation in the bill with respect to such improvements, the court cannot consider such evidence in the decision of the cause.

That time is not generally of the essence of such contracts, see *Wallace v. Pidge*, 4 Mich., 570; *Morris v. Hoyt*, 11 Mich., 9; *Richmond v. Robinson*, 12 Mich., 193; *Converse v. Blumrich*, 14 Mich., 109. That it may become so where the vendee delays until the value of the property is essentially changed, see *Smith v. Lawrence*, 16 Mich., 499.

That the court cannot give relief on a case proved but not put in issue by the pleadings, see *Wurcherer v. Hewitt*, 10 Mich., 468; *Peckham v. Bufum*, 11 Mich., 529; *Dunn v. Dunn*, 11 Mich., 284; *Moran v. Palmer*, 13 Mich., 367.

And on the general subject of specific performance, see *Burtch v. Hogge*, *ante* 31, and notes.

Bowler v. Caldwell.

The answer denies making the agreement set out in the bill, but admits that an agreement was made in substance as follows :
68 *The defendant agreed to sell the land in question to the complainant, but defendant does not recollect whether the complainant was to pay two or three dollars per acre ; that the defendant was to receive \$80 in cattle from the complainant in part payment, upon the delivery of possession of said land ; that the complainant further agreed to deliver to the defendant during the fall next succeeding, a certain yoke of oxen as a further payment, and the balance in three years, with interest, and also to pay the taxes on said land, and on two other tracts which the defendant owned.

The defendant denies that he agreed to give further time after the expiration of said three years, to pay the balance of the consideration money, should the complainant find it inconvenient to pay such balance, or receive grain instead of money, or any other cattle than the yoke of oxen which the defendant avers the complainant was to deliver in the fall ; the defendant further states that it was understood between the parties that a bond for a deed was to be given to the complainant upon receiving the said yoke of oxen, and a deed upon the payment of the whole amount agreed to be paid.

The defendant admits that in the fall of 1835 the complainant called upon him, and said that he was ready to pay the amount due for the purchase of the said tract of land, etc., and further admits that the complainant asked him, the defendant, to receive the balance due, which the complainant said he then had in money, etc.

Whipple and Vandyke, for complainant.

F. Johnson, for defendant.

THE CHANCELLOR.—From the testimony there can be no doubt that the agreement between the parties was substantially as stated in the bill.

By the testimony in the case, it appears that the price to be

Bonier v. Caldwell

paid by the complainant for the land was \$150; that \$80 was *paid down, leaving only a balance of \$70 due; that 69 the land was surveyed by defendant, and that he put the complainant in possession. It further appears that complainant has resided on the land ever since, and that he has built an addition to the house, has cleared, fenced and improved some twenty-five acres of land, and set out an orchard. The improvements are estimated by the witnesses at from \$200 to \$500.

The payment of so considerable a portion of the purchase money, the being placed in possession by the defendant, and the long occupation by the complainant, and valuable improvements made by him on the premises, are such acts of part performance as to take the case out of the statute of frauds.

It is next to be considered whether there has been such a neglect to perform the conditions of the contract, on the part of the complainant, as to preclude him from relief in this court.

There is some discrepancy between the answer and the testimony as to what the precise terms of the agreement were.

The witnesses Lavigne and Antaillaird both state that the agreement was, that after the payment of \$80, the defendant was to give the complainant three years to pay the balance, and that if the defendant was not then able to pay, he would give him a longer time and would not trouble him. The defendant, in his answer, says the complainant was to have delivered to him another yoke of oxen in the fall, and that then he was to have three years to pay the balance. He further says his object in selling the land was to obtain the oxen in the fall, and also because he should want money at the end of three years.

It is conclusively established that the price to be paid for the land was \$150, and that \$80 was paid down, and that the balance due was but \$70. Now if the oxen had been delivered in the fall, at \$50, there would have been but \$20 remaining.

It seems somewhat strange that the defendant (who is a man of wealth, as appears) should let either the one or the other of these objects form the inducement to the sale.

Bowler v. Caldwell.

From a view of the whole case, I am led to the conclusion *that this matter of the delivery of the oxen in the fall did not form any part of the original contract, and that this matter is improperly blended with the agreement set up in the answer. It seems incredible that three years' time should have been given to pay the \$20, with the assurance that, if it should become necessary, the time should be further extended.

The defendant states in his answer that he does not remember whether the price of the land was \$150 or \$225. Now, if he cannot remember what the price of the land was, it may be presumed, without any imputation of intentional mis-statement, that he may have so far, at least, forgotten its details as to have mingled that which was a matter of subsequent conversation with the original agreement. Three witnesses concur in their statements with regard to the price to be paid for the land, and as to the terms of agreement between the parties; and this statement of the agreement which is given by the witnesses was made by the parties about the time the sale was made, and when it was fresh in the recollection of both the complainant and the defendant. The terms of the agreement were simple and easily understood, and the witnesses all concur that \$150 was to be paid for the land, \$80 of which was paid down, the balance to be paid within three years; that the complainant stated at the same time that, from the relation which existed between him and the defendant, if defendant could not pay him the balance at the end of the three years, that he would not trouble the defendant, but would give him further time. Can this be reconciled at all with the fact that the balance was only \$20? There can be but little doubt that the witnesses state the contract correctly, and that this agreement to deliver the cattle in the fall, and to pay taxes, was in pursuance of the agreement that the defendant would receive cattle or grain for the balance. This is perfectly consistent with the conversation between the complainant and the defendant, mentioned by Le Duc in his testimony, and in no other way can the whole of the testimony be reconciled.

When the defendant said to the complainant, "You did not bring the oxen!" the complainant replied, by way of apology, *that one of them had died; and this conversa- 71 tion is perfectly consistent with the testimony of the three witnesses first named. In their statement of the agreement there appears to have been no condition that the complainant was to deliver to the defendant a pair of oxen, as stated in the answer. This must have been a matter of subsequent conversation, and in no other way can it be reconciled, either with the testimony or the other facts in the case.

But even supposing this condition had made a part of the original agreement under the facts in the case, this court would hesitate much before it would refuse relief to the complainant.

Here the excuse for the non-delivery of the oxen was, that one of the oxen died before the time they were to have been delivered. The defendant permitted the complainant to remain in possession, without taking any steps to rescind the agreement, until 1835, and permitted him to go on uninterrupted to make valuable and permanent improvements on the premises. This case, in itself, is not of great importance, but it is important to the complainant, as it involves the labor of many years.

I cannot well conceive of a case which would call more strongly upon the court to decree a specific performance of a contract, on the ground of part performance, than this. The tender on the part of the complainant was sufficient under the circumstances; it was an offer to pay the balance, which was refused by the defendant.

The complainant must have a decree for a specific performance upon payment of the balance due, with interest.

 Cooper v. Alden.

**David Cooper and Charles Jackson v. Hiram Alden and others,
Commissioners of Internal Improvement, and the Mayor,
etc., of Detroit.**

Order for injunction by officer out of court: Motion to dissolve. An injunction granted by a justice of the supreme court, in cases where the statute authorizes it, stands upon the same footing as if granted by the Chancellor; and in either case it is competent for the defendants, in vacation, and before they put in their answer, to move to dismiss the injunction for want of equity in the bill.

Lot owners in Detroit, rights of in streets. Purchasers of lots in the city of Detroit acquire no other or greater rights from the fact that said city was laid out by the governor and judges of the late Territory of Michigan, under an act of Congress authorizing them so to do, than they would acquire if the same had been laid out by an individual who had legally dedicated certain portions for streets and alleys.

Rights of lot owners in streets: Power of city to lease street. Purchasers of lots bounded on a street or square acquire a right to have such street or square preserved and appropriated to the uses for which it was dedicated, and the city, in the absence of any express authority, has no power to lease any portion of such street or square, to be used for a purpose destructive of the ends for which it was originally dedicated. (a.)

Injunction to prevent improper appropriation of street. Where land is dedicated to a particular purpose, and the municipal authorities undertake to appropriate it to an entirely different one, they may be restrained by injunction, on the application of an adjoining lot owner, from so doing.

Corporate powers of Detroit. The corporation of the city of Detroit has no power except that which is conferred by the act of incorporation or other acts specially relating thereto. (b.)

Commissioners of internal improvement, power of to appropriate streets. The commissioners of internal improvement have no right, under the general powers conferred on them, to appropriate a portion of a street in the city of Detroit for the purpose of erecting offices and other buildings thereon. (c.)

Injunction against public officers. Equity has undoubted jurisdiction to interfere by injunction where public officers are proceeding illegally and improperly, under a claim of right, to do any act to the injury of individual rights. (d.)

(a.)—See *People v. Carpenter*, 1 Mich., 173. See, also, a very full discussion of this general subject in *Milhau v. Sharp*, 17 Barb., 436; *Same v. Same*, 28 Barb., 228; same case on appeal, 27 N. Y., 611.

(b.)—The general inclination of courts seems to have been to construe all charters of incorporation strictly, and to require the corporation in all cases to show legislative authority for the powers it assumes to exercise. See *Dunham v. Rochester*, 6

Cooper v. Alden.

The bill in this case was filed September 20, 1838, and stated that complainant Jackson was the owner in fee of the west half of lot number 43, and that complainant Cooper was the owner in fee of the east half of said lot, and also the entire lot 42, both of said lots being in section six of the city of Detroit, according to the plan of the city made and adopted by the governor and judges of the late Territory of Michigan, pursuant to the provisions of an act of congress for that purpose.

*That said lots were situated adjoining and fronting on a 73 public street called Michigan Grand avenue, 200 feet wide; that said street was laid out and established as a public street and open space, not only for the free and uninterrupted use of all the citizens as a street, but for the ornament of said city, and more especially for the convenience, benefit, use and healthfulness of the lots adjacent to and situated on said avenue; that complainants, and those through and under whom they claim, had been in the full, peaceable, quiet and uninterrupted possession of said lots and of said avenue, as an easement, for more than twenty-five years last past; that they gave a much greater price for the lots than they would have done, had they supposed they did not acquire a vested right in said avenue as permanent and indefeasible as in the lots themselves; that they had expended large sums of money in improving said lots, had

Cow., 466; *Mayor of Savannah v. Hartridge*, 8 Ga., 23; *Rochester v. Collins*, 12 Barb., 559; *Reed v. Toledo*, 18 Ohio, 161; *Mt. Pleasant v. Breeze*, 11 Iowa, 339; *Bennett v. Birmingham*, 31 Penn. St., 15.

(c.)—In *People v. Carpenter*, 1 Mich., 173, it was said that neither the common council of Detroit nor the governor and judges (the legislative authority) of Michigan Territory could authorize the exclusive use of any of the streets of the city by individuals. This is unquestionably true so far as the appropriation would interfere with the vested rights of adjoining individual lot owners, and to that extent the case of *Carpenter* supports the present.

(d.)—See *Brown v. Gardner*, *post.* 290. The right to restrain public officers by injunction, when proceeding illegally, was also recognized in *Williams v. Detroit*, 2 Mich., 560; *Woodbridge v. Detroit*, 8 Mich., 274; *Palmer v. Rich*, 12 Mich., 414; *Miller v. Grandy*, 13 Mich., 540; *Conway v. Waverly*, 15 Mich., 257; *School District v. Dean*, 17 Mich., 223; *Ryan v. Brown*, 18 Mich., 196; *Kinyon v. Duchene*, 21 Mich., 498.

Cooper v. Alden.

erected expensive buildings and actually resided thereon with their families for several years.

That the mayor, recorder, aldermen, etc., of the city of Detroit, September 4, 1838, executed a lease to the people of the State of Michigan, reciting that,

"WHEREAS, Pursuant to a call of the mayor of the city of Detroit, a meeting of the freemen was held at the city hall, in said city, on Thursday, the second day of August, A. D. 1838: *And whereas*, after said meeting was duly organized, and the object of the call explained, the following resolution was adopted by said meeting, viz:

"*Resolved*, That the common council of said city be authorized to lease to the State of Michigan a space in Michigan Grand avenue, between the city hall and Bates street, adjoining Bates street, sixty feet in width and extending one hundred and forty feet towards the city hall, for the purpose of erecting a brick building for a depot for passenger cars, and for other purposes connected with the operations of the Central Railroad; and also the privilege of laying a track or tracks from the present termination of the railroad, in the most eligible manner, to the aforesaid ground between Bates street and the city hall.

74 * "Now, therefore, be it known, that the common council of said city, in obedience to the resolution of the freemen of said city, above recited, so far as they have power and authority under the city charter and amendments thereto, and without the intervention of a jury to assess private damages, and in this manner so to do, do hereby lease to the people of the State of Michigan all that space of ground in the center of Michigan Grand avenue, in said city, between the city hall and Bates street, sixty feet in width on the west side of Bates street, adjoining said Bates street, and extending one hundred and forty feet towards the city hall, for the purpose of erecting thereupon a brick building, to be used as a passenger car house and for railroad offices, connected with the operations of the Central railroad only. And the said common council, so far as they have power,

Cooper v. Alden.

as aforesaid, do hereby also grant to the people of the State of Michigan the other privileges in said resolution of the freemen above recited, for the purposes therein specified.

"It being always understood, however, and these presents are upon these express conditions, and not otherwise, viz :

"That these presents and the privileges and ground hereby granted and leased to the people of said State, shall continue and be in force so long as said ground and the buildings thereon to be erected, and said privileges, shall be used and occupied for the purposes hereinbefore specified and mentioned, and that as soon as they shall cease to be thus used and occupied, they shall all and singular forthwith revert to the mayor, recorder, aldermen and freemen of the city of Detroit, and these presents from thenceforth be null and void.

"And upon the further condition, that no more than one track or railway shall be placed or made across Woodward avenue, from the present termination of the railroad, for the purpose of arriving at said passenger car house.

"And upon this further condition, that in case the people of said State, or their agents, or the commissioners of the Central railroad, or the acting commissioner thereof, do not, within one month from this date, notify the common council of said *city of the acceptance of this lease and privileges hereby 75 granted, subject to the provisions, conditions and understanding hereinbefore and hereinafter contained, or in case the said people or their agents, or said commissioners or commissioner, or his or their successors in office, do not, within the period of one year from and after the date of such notification to said common council, have erected and completed the aforesaid brick building, and in use for the purposes aforesaid ; then, and in each of these cases, these presents shall cease, be inoperative, null and void. And these presents are upon this further express condition and understanding, and not otherwise, viz : that the said State of Michigan shall and will, from time to time, and at all times, save harmless and keep indemnified said common council and every

••

Cooper v. Alden.

member thereof, and the mayor, recorder, aldermen and freemen of the city of Detroit, of and from all damages, sums of money, costs, charges, troubles, suits and expenses which they or any of them shall or may, at any time hereafter, be put unto, by being compelled to pay damages or sums of money to individuals, by reason of said common council having executed these presents, or on account of said space of ground and privileges hereby granted being used or occupied as aforesaid. In testimony," etc.

That if said road should be constructed and laid down as contemplated, it would pass along the entire front of complainants' dwelling houses and premises on Michigan Grand avenue, and near to the same; and that if the building contemplated by the lease should be erected, it would greatly incumber said avenue, and block up and obstruct the free use of the same, and extend across the entire front of said lots, to the great annoyance and damage of complainants. The bill charged that the lease was made without authority; it further stated that the commissioners of internal improvement did, on or about the same day the lease was made, accept the same in behalf of the people of the State of Michigan, and by a resolution of the board directed the acting commissioner on the Central railroad to go on and erect the buildings, and lay down the track of the railroad, as con-

76 templated in the lease, without *providing any compensation whatever for complainants' damages; that Hiram Alden, the acting commissioner, had employed engineers and other persons, and actually commenced the construction of said road and buildings, and threatened to continue the same; that the necessary grade for said road would elevate the same from one to three feet above the general level of said avenue.

The bill prayed an injunction to restrain the commissioners from constructing the road and erecting the buildings, in said Michigan Grand avenue, etc.

Upon proof of the sickness of the chancellor, an injunction was granted, according to the prayer of the bill, by the Hon. George Morell, one the justices of the supreme court, September 20, 1838.

A motion was now made to dissolve the injunction for want of equity in the bill.

P. Morey, attorney-general, for defendant Alden.

1. The complainants do not show such rights as will authorize the court to interfere in their behalf by injunction, nor such a case as will sustain a decree.

2. If the court should be against us on the first point, then we say, that by their own showing in the bill, they have an ample and complete remedy at law for the injury complained of; for if they have rights to sustain this proceeding, they must have sufficient to sustain a suit at law for the trespass; or, if their property is injured, they can appeal to the appraisers under the provisions of the 15th section of the act for the regulation of internal improvement, etc., *page 197, session laws of 1837*.

3. By the provisions of the 20th section of the act relative to the city of Detroit, approved April 4, 1827, and the 1st section of an act to amend the same, approved June 29, 1832, the common council are vested with full power and authority "*to make or alter streets*" and "*generally to do and perform under the by-laws and ordinances or other directions of the common council,*" whatever *may be for the regularity, public health, and convenience of the city*.

*And by the lease set out in the bill, all this power is delegated to the board of internal improvement. This, it is contended, must operate as an estoppel of any claim of the complainants, and as a relinquishment of damages by the city of Detroit; and on this ground, it is contended there is no equity shown in complainants' bill, or rather that their own showing divests them of a right to interfere.

4. But conceding all other grounds, it is still contended that the "*right of eminent domain,*" under our constitution and laws, must remain with the sovereign power, the people; and that the defendant, Hiram Alden, acting commissioner of the Central railroad, who appears for the purpose of making this motion, *was but*

Cooper v. Alden.

acting as the agent of the people in the exercise of this right, in doing the acts complained of in the bill, and consequently that no court can interfere with or restrain him and his associates, in the exercise of the power thus delegated to them by the sovereignty of the State.

It is urged that this right of "*eminent domain*" was intended to be exercised by the legislature, and that it is fully delegated to the commissioners of internal improvement by the 15th section of the act for the regulation of internal improvement, and for the appointment of a board of commissioners, approved March 21, 1837. (*See session laws of 1837, pages 197 and 198.*)

The following authorities are referred to as fully sustaining the construction contended for. (*Rogers v. Bradshaw, 20 Johns., 735, and cases cited; Wheelock v. Young and Pratt, 4 Wend., 647; Beekman v. Saratoga and Schenectady R. R. Co., 3 Paige, 72, 73, and cases cited; Varick v. Smith and Attorney-General, 5 Paige, 137; The Mohawk Bridge Co. v. The Utica and Schenectady R. R. Co., 6 Paige, 560 to 565; and the Charles River Bridge Co. v. The Warren Bridge Co., 11 Peters, 536 to 538, and the cases cited.*)

5. It is contended also, that the allegations in the bill show that the people of the State of Michigan, the grantees in the lease, which the complainants seek to have delivered up to be canceled, should have been made parties to the bill, and that the

78 *injunction should be dissolved because their rights cannot be infringed in a case to which they are not parties.

Woodbridge & Backus, contra. (Argument omitted.)

84 *THE CHANCELLOR.—A preliminary objection is made by the counsel for the complainants, that the injunction in this case, having been allowed upon the bill, as sworn to, and no answer having been put in, nor the state of the case varied, it is not competent, or according to the course of practice, to move to dissolve on the same state of facts in vacation.

Our statute (R. S., 376, sec. 103) authorizes the justices of the supreme court severally, to "exercise the powers of the chancellor, with respect to the granting of injunctions," in certain cases. An

Cooper v. Alden.

injunction granted by a justice of the supreme court, in cases where the statute authorizes it, stands upon the same footing as if granted by the chancellor, and in either case, it is competent for the defendants in vacation, and before they put in their answer, to move to dissolve the injunction for the want of equity in the bill. (See *Minturn v. Seymour*, 4 Johns. Ch., 173.)

It is urged by the counsel for the complainants, that the mayor, recorder and aldermen had no authority to make the lease to the commissioners of internal improvement; that the city of Detroit, having been laid out by the government of the United States, and lots purchased with reference to the plan of the city, adopted by the government at the time of laying out the same, the purchasers have acquired vested rights of such a character, that the plan of the city, thus adopted and established, cannot be changed or in any manner interfered *with, even by the full and 85 express authority of legislative power, and that the exercise of such a power is regarded in the light of a revocation of a grant, or the violation of the obligation of a contract, and the cases of *Fletcher v. Peck*, and *Dartmouth College v. Woodward*, are cited in support of this doctrine. I cannot view the question in this light. I am unable to perceive that the United States, by authorizing their trustees, the governor and judges, to lay out a town, intended to convey or did convey, any other or greater rights to purchasers of lots in the premises, than would be acquired by purchasers of lots where an individual had laid out a town or city, and had legally dedicated certain portions for streets and alleys, on which lots were bounded. But it is undoubtedly true that purchasers of lots bounded upon a street or square, acquire a right and are interested in its preservation, and the application of such street or square to the uses for which it was dedicated; and should any city corporation, without full and express authority so to do, undertake to grant any portion of such public street to other individuals, to be used for any purpose which should be destructive of the ends for which such street was originally dedicated, such grant would be void. It is not necessary to discuss

Cooper v. Alden.

at present, the extent or the limits of the legislative power to authorize an improvement in a city or town, by the change of a plan, or a mere easement as a right of way for a railroad, or even the absolute appropriation, for the purpose of erecting permanent public buildings.

If the ground had been dedicated to a particular purpose, and the city authorities had appropriated it to an entirely different one, it might afford ground for the interference of a court of chancery to compel an execution of the trust, by restraining the corporation, or causing the removal of the obstruction. (See *Barkley v. Howell's Trustees*, 6 Peters, 507.)

It is contended that the common council of the city of Detroit, in granting the lease set out in the bill, have exceeded their powers; that no such authority has been given to the city authorities by the statutes creating and governing the corporation, *and that the act making such grant is void, and can in no manner affect the rights of the complainants.

The authority of the common council to lay out, change or alter any street or highway, is contained in the second section of the act entitled "An act to amend an act entitled 'An act relative to the city of Detroit,' approved June 29, 1832," which provides "that when any street, lane, alley, sidewalk, highway, water course or bridge, is proposed to be laid out, established, opened, made or altered by the said common council in said city, due notice shall be given to all persons whose property will be affected thereby, and a jury shall be drawn," etc., "who, after being sworn, shall go on to the premises on which it is proposed to lay out, establish, open, make or alter any street, lane, alley, sidewalk, highway, water course or bridge, as aforesaid, and from an actual view of the premises, shall, upon their oaths, determine whether the public improvement or convenience require the thing proposed should be done, and if they agree in the affirmative, then they shall proceed to assess the damages, if any, upon any property affected thereby, respectively, to each owner or occupier thereof, and the said damages shall be paid before such improve-

Cooper v. Alden.

ment or alteration shall be made, and within one month after the verdict, which shall be returned to, and recorded in the mayor's court, shall have been rendered," etc.

The other sections of the acts relative to the city of Detroit, referred to, have no application to the present case. The corporation of the city of Detroit have no power, except that which is derived from the act incorporating the same, or the acts specially relating thereto. (See *The People v. The Corporation of Albany*, 11 Wend., 544; *Oakley v. The Trustees of Williamsburg and Monroe*, 6 Paige, 262.)

Does the statute above referred to authorize the corporation of the city of Detroit, by a vote or lease, to make a permanent appropriation of a part of one of the streets of the city for the purpose of erecting a large and permanent building, and to the great injury of individuals? Is it such an alteration or change of the public street as is contemplated by the act? The *corporation have not pretended to follow the forms of law. 87 It is so alleged, and their acts show it to be so. The lease is carefully guarded. It says: "The common council so far as they have power and authority, under the city charter and amendments thereto, and without the intervention of a jury, to assess private damages, and in this manner so to do, do hereby lease to the people of the state of Michigan," etc. This lease purports to have been executed by virtue of a resolution of a public meeting of the freemen of the city of Detroit. But this cannot vary the case; a portion, or even a majority of the citizens cannot legislate upon the rights of others in this way. It is competent for individuals to stipulate as to their own rights or their own property, but they cannot in this way interfere with the rights or property of others.

The hasty conclusions of a public meeting, regulated by no forms or rules of proceeding, would be substituted for the safe guards of our constitution and laws. It would be deserting at once the learning and the labors of the statesmen and law-givers who have endeavored to define and protect the rights of property

Cooper v. Alden.

among other rights, and submitting all to the passions or interests which should prevail at the moment. If it is competent to lease a street in this manner to be occupied for this purpose, it would be for any other purpose; and whoever should happen to be the individual whose dwelling was approached in this manner, would be fully sensible of the danger and inconvenience of such an exercise of power. It is not in the power of the city authorities, at all events, under the existing laws, to make such a grant to the injury of any individual; and the complainants may properly treat this proceeding, as far it interferes with their rights, as void, and as conferring no authority upon the commissioners of internal improvement to erect the building complained of, to their injury. But it is insisted that if it should be found that the common council exceeded their powers in granting the lease in question, still the commissioners of internal improvement have full authority to do the acts complained of by the bill.

This presents a difficult and important question.

88 *By the thirteenth section of the act for the regulation of internal improvement, etc. (*Session Laws of 1837, page 196*), the board of internal improvement are authorized and required to establish the rates of toll, etc., and "to erect all such toll houses, weighing scales, offices, and other edifices; and also to purchase such grounds for the convenience thereof as they may think necessary for the convenience and profitable use of their canals or railroads," etc.

The 15th section of the same act provides that "the said board are hereby empowered to receive any cessions or grants for the use of the people of this State, from any person or persons, of any lands *through* which any line of canal or railroad or other *public work*, shall have been located. Said board of commissioners, and every acting commissioner under their direction, shall be, and they are hereby, vested with all the privileges and powers necessary for the location, construction and keeping in repair all canals, railroads and other improvements of which they may have charge; and the said board, their agents or those with whom they may

contract for working or repairing any of said works of internal improvements, or any parts thereof, may enter upon, use and excavate any land which may be wanted for the site of the same, or any other purpose which is necessary in the construction or repair of any of said works," etc.

It is said, by the counsel for the defendants, that these two sections give the commissioners full power and lawful authority to do all that it is alleged in the bill they have done, or contemplate doing.

Have the legislature, by these general powers, authorizing and requiring the commissioners to erect toll houses and other edifices, and to purchase the lands necessary for the convenience thereof, etc., authorized them in the manner complained of by the bill, to appropriate and occupy a public street for a permanent building, 140 feet long by 60 feet wide, to the great damage, as alleged in the bill, of the complainants?

After the most careful examination, I have been led to the conclusion that the legislature did not contemplate conferring
*this power on the commissioners, and that no such power 89
is, by the act, conferred.

In order more fully to understand this question, it may be well to refer to the laws of the State of New York upon this subject, and the construction which has been given to the powers of the commissioners conferred by those laws.

By the 16th section of the revised laws of New York, full power is given "to erect on, and take possession of, and use all lands, streams and waters, the appropriation of which for the use of such canals and works, shall, in their judgment, be necessary." By the 19th section of the same law, it is provided "that whenever for the purpose of constructing a canal or making any extraordinary repairs or improvements, it shall be deemed necessary by the canal commissioners having charge of the work, to discontinue or alter any part of a public road on account of its *interference* with the proper location or construction of such work, he shall make or direct to be made, such discontinuance or alteration."

Cooper v. Alden.

By the 24th section of the same law, the board of commissioners are authorized to erect such toll houses, offices and other edifices, and purchase such grounds for the convenience thereof, as may be deemed necessary for the profitable use of the canals," etc.

It would seem, then, that the legislature of the State of New York, only contemplated the discontinuance or *alteration* of any public road in case of its interference with the proper location or construction of the canal, repairs or improvements, and deemed it necessary to authorize it, by special authority; so to do. The general powers given to the commissioners in this act, are substantially the same as the powers conferred upon the commissioners of our State by the act above referred to. For the purpose of offices or edifices, I am inclined to believe that the laws of New York contemplate the acquisition of lands by purchase or grant, only. It certainly does not contemplate occupying a highway, in a case like the one now before this court; but only in cases where the highway shall interfere with the public works.

90 *By the 13th section of the act of this State, before referred to, the commissioners are authorized to construct all houses and necessary edifices, etc., and to purchase lands for the convenience thereof, etc.; and it is urged that by the general powers contained in the 15th section of the same act, it is competent for the commissioners to appropriate a part of one of the public streets for the purpose of erecting thereon the proposed edifice, and to extend the railroad some twenty rods, as appears from the plat exhibited, from its present termination, and directly away from the route, and not as a connecting link between its points of termination. Can it be fairly inferred from the act, that it was contemplated to authorize the occupation and obstruction of highways for public buildings, in this way?

I cannot view the powers conferred by the 15th section in any other light than as applying to cases where it became *necessary* to appropriate property, and interfere with private rights, in carrying out the great objects of the law to connect the two points of termination by a continuous railway, and that the legislature did

Cooper v. Alden.

not contemplate or intend to confer the power to construct lateral ways to the distance here contemplated, and there appropriate a public highway for the purpose of a large permanent building for car houses and offices.

The strongest case to be found in support of the exercise of such broad powers, is the case of *Rogers v. Bradshaw*, 20 Johns., 735. In this case, where the route of the canal interfered with a turnpike road, the supreme court held that the commissioners were not justified in placing the road on adjoining lands, although it was proved in the cause that the one or the other must yield. On appeal to the court of errors, it was held that the general authority to discontinue a public highway included a turnpike; and, also, that under their general powers, it was competent for them to make this diversion of the turnpike from the necessity of the case, and that the legislature must have intended to confer this power, which was necessary to carry their general powers into effect. The court say: "the turnpike road was *unavoidably encroached* upon by the canal. Another road was *indispensable* before the *canal was commenced, and the land taken 91 was *necessary* for the road; and further, it is very certain the improvement of the canal at this place could not be prosecuted without the road."

Is it to be inferred from the reasoning in the above cited case, that the general provisions of our statute above cited, reach a case like the present? Here the proposed erections are manifestly not absolutely necessary to carry into effect the general powers of the board of commissioners, but the road is extended to a distance from the line of the railroad, and the public street in front of the dwellings of the complainants permanently appropriated.

Would the court, in the case above cited, have construed this as coming within the meaning of the statute? It is believed not.

But it is said the discretion is vested in the board of commissioners, and that no other tribunal should interfere. This is probably the correct view of the exercise of the powers clearly

Cooper v. Alden.

given them by law, and the exercise of which is necessary to carry out the objects contemplated by the act. But is it true, that by virtue of their appointment, they may exercise unrestrained power over the property or rights of others, and that no remedy exists but an appeal to the legislative power? This would be subverting and overturning one of the first principles of our government.

A liberal construction of the powers the board of commissioners have granted to them, and necessary for the important objects of their appointment, should be given; but if those powers are exceeded, to the injury of the rights of individuals, the courts, of course, when appealed to, must hear and decide.

This court has undoubted jurisdiction to interfere, by injunction, where public officers are proceeding illegally or improperly, under a claim of right to do any act to the injury of the rights of others. (See *Mohawk and H. R. R. Co. v. Artcher*, 6 Paige, 88; *Oakley v. Trustees of Williamsburg, Id.*, 264; *Gardner v. Trustees of the village of Newburg*, 2 Johns. Ch., 162; *Belknap v. Belknap, Id.*, 463.)

92 *The commissioners would not, perhaps, be trespassers unless they acted in bad faith; but when this court is appealed to, to protect the rights of parties, I know of no rule nor of any reason that will excuse it from adjudicating upon the law and the rights of these parties, as it would be compelled to do in every other case.

This, then, being the view entertained by the court, the question recurs, have the powers attempted to be exercised by the board of commissioners been granted by the legislature? If this extension from the line of the road, and the car house and offices, etc., proposed to be erected, are authorized by the act, what is the limit of the powers of the commissioners? If it may be extended twenty rods, it may, upon the same principle, be extended one hundred rods. If the street in front of the residences of these complainants, may, by virtue of these general powers, be occupied for the purposes here contemplated, and there is no remedy, I can

Cooper v. Alden.

see nothing to prevent the occupation of the street in front of the residence of any other individual for a furnace for the manufacture of engines, and another for a shop for the manufacture of cars or carriages, for store houses, or for a dwelling house for the residence of the receiver of tolls. I cannot well perceive where the limits of this implied power are to be found. It is a conclusion from which I cannot escape, that the legislature, by the general term of canals, railroads and other improvements, and authority to occupy any lands wanted for the site thereof, or for any other purpose *necessary* in the construction and repair of any of said works, did not intend to confer powers of the kind here claimed; but the term "other improvements," must have reference to the improving the navigation of rivers and the various works of internal improvement under their charge.

That the legislature did not contemplate, after authorizing and requiring the board to build edifices, etc., and to purchase such lands as were necessary for the convenience thereof, giving power to occupy lands and highways without consent or purchase in the manner here complained of; and that lands, *etc., 93 were only to be taken against the consent of the owners on the grounds and for the reasons for which such powers are usually given, from the *necessity of the case*, where the taking is necessary to carry into effect the great general objects in view. Such has been the course in New York and elsewhere, so far as I have been able to ascertain.

The right of the legislature to grant such powers of appropriating lands or highways for the erection of offices, edifices and other public buildings of the kind here contemplated, it is not intended now to discuss; but if such powers are granted, it is but reasonable to presume it will be definitely done as in the State of New York, and as was done by our legislature in extending the Central railroad down Woodward avenue, in the city of Detroit, and not by implication, and with proper safeguards.

It has been urged that the statute of March 20, 1837, section 2, required that the surveys of the several routes should be first

Cooper v. Alden.

made; that notice should then be given, and after hearing those interested, the commissioners should then proceed to establish such routes, and file in the office of the secretary of state, accurate plans of such surveys and locations. That, as it is alleged in the bill, and there being no answer, of course no denial, that the extension complained of was ordered by a resolution, merely to make this extension according to the terms of the lease, and alleged to have been done without law or right, and without observing the mere forms of law; that the proceeding is irregular, and the parties cannot show it to have been legally done by reference to the statute merely, but must show affirmatively and positively, by way of answer, that they have pursued its forms and kept within the powers granted.

After the views expressed on other points in this case, it may not be very material for the purposes of this motion to decide this question. But, as it may be convenient as a question of practice, it may be proper to express my views upon this point. This is a motion to dissolve an injunction without answer, and for want of equity in the bill.

So far as the statute, which is a public law, goes to show

94 *that the acts of the commissioners, as set out in the bill, are within their powers, and to be exercised in the manner therein stated, so far is it competent to show by it, they are lawfully authorized to perform the acts they are alleged to have performed, and that the complainants have no just cause of complaint, and that hence results a want of equity in the bill.

It has been further said in the argument, that the legislature, by their act of April 6, 1838, have themselves put a construction upon the powers of the commissioners, and that further legislation was necessary to authorize a further extension of the railroad from its present termination.

This act provides that the commissioners are hereby authorized, with the consent of the common council of the city of Detroit, to extend the tracks of the Central railroad from its present termination down Woodward avenue to its intersection with Atwater

street, and thence each way along said Atwater street as far as said commissioners may deem best for the public good, etc.

This may not be of decisive consequence in the decision of this question, but it certainly may be regarded as confirmatory of the views heretofore expressed of the proper construction of the general powers of the commissioners. The commissioners themselves, by asking and obtaining a lease of the city, and by the uncontradicted allegations of the bill, acting in pursuance of it, and making it the basis of their proceeding in this matter, seem to have taken the same view of their powers.

But it is said that whatever views may be taken of the powers under which the commissioners acted, still the complainants have not made a case of such an interference with their rights, as calls for the interposition of this court by injunction.

It must be remembered that the allegations contained in the bill are not denied, and that, for the purposes of this argument, they must be taken as true, as admitted.

In regard to the injury, the bill alleges, in substance, that the complainants, and those under whom they claim, have been in possession for more than twenty-five years; that the complainants have laid out large sums of money in erecting buildings, *and preparing residences for themselves and their fami- 95 lies; that the obstructing said street by buildings and permanent fixtures would render the complainants' premises uncomfortable, inconvenient and unsafe, in proportion as the said street should be contracted or obstructed; and that, should said avenue be permanently contracted, their plans of making said premises a place of residence would be wholly defeated, and they would be compelled, to their great loss and damage, and in violation of their vested rights, either to suffer hazard, inconvenience, annoyance and wrong, or to abandon their improvements, made on said premises, and seek elsewhere a place of residence.

That if said building shall be erected, as contemplated by said lease, it will greatly encumber, block up and obstruct the free use of the same; and will extend across the entire front of lot 42, and

Cooper v. Alden.

nearly all of the eastern half of lot 43, the property of the complainants, to the great annoyance and damage of the vested rights of complainants and other proprietors of lots on said avenue. That the board of commissioners have directed said building to be erected, etc., to the great wrong and injury of complainants, without pretending to provide any compensation for the great damages the complainants would sustain thereby, and without pretending to pursue any of the mere forms of law. That defendants, or some of them, have commenced breaking up the streets, etc., and that they fear, unless restrained, they will go on and erect said building, dig up and encumber said avenue, to the great and irreparable loss and damage of the vested rights of complainants. That the street, as they believe, must be elevated from one to three feet, etc.; that they will be deprived of all passage, except at the peril of the lives and safety of themselves, families and property, by reason of the cars, engines and other vehicles passing and re-passing upon said railroad, and collected about said contemplated depot; and that said railroad and building will be a great and intolerable nuisance to the said complainants' said premises, and render the same wholly unfit and unsafe as a

place of residence for the complainants and their families,
96 *and that their premises would be in danger of fire from engines passing and being stationed so near them, etc.; with other allegations of similar import, and to which it is not necessary further to refer. The foregoing are referred to, merely to show the character of the averments in the bill, and to test the question whether such a case is made, which standing uncontradicted, that the court is bound to interfere.

It is said that as there is a plat accompanying the bill showing the extent of the obstruction contemplated, this court can, without denial of the strong allegations of the bill, which are sworn to by the complainants in this cause, infer that they are mistaken in their views, and that they do not sustain such an injury as they have alleged. This would be going quite too far. The substantial allegations of the bill must be held to be true

Cooper v. Alden.

until denied. Is there, then, such a case made as renders it the imperative duty of this court to permit the injunction allowed by the judge of the supreme court to stand until an answer?

Of this, if the most respectable authorities furnish a guide, and if the views previously expressed in this cause are correct, there can be very little doubt. In *6 Paige*, 264, *Oakley v. The Trustees of Williamsburgh*, where the trustees were proceeding to dig down a street, the chancellor says: "if the trustees have no such powers as they have assumed to exercise, then this appears to be a very proper case for the allowance of an injunction, to restrain an illegal proceeding by them, to dig down and alter the grading of the street as established, which, as alleged in the bill, will be a material injury to the value of the property of these complainants." The cases cited, *2 Johns.*, 463; *Belknap v. Belknap*, 1 *Vesey*, 188; *Sluah v. Trustees of Morden College*; *Agar v. The Regents Canal Com.*, *Cooper*, 77, and *6 Paige*, 88, are also in point, and show that jurisdiction in this class of cases has been in constant exercise.

The case of *Corning and others v. Lowrie*, 6 *Johns Ch.*, 440, is strictly analogous. This was a bill for an injunction to restrain the defendant from obstructing Vestry street, in the *city of New York, and averring that he was building a 97 house upon that street, to the great injury of the plaintiffs, as owners of lots on, and adjoining that street; and that Vestry street has been laid out, regulated and paved, for about twenty years. The chancellor distinguished this case from that of the *Attorney-General v. The Utica Insurance Company*, inasmuch as here was a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs, and upon these grounds the injunction was granted. I am unable to distinguish this case from the one under consideration.

It results, then, that, having jurisdiction of the subject matter, and being appealed to by those who, as they allege, are suffer-

Cooper v. Alden.

ing wrong and injury, and who have made a case coming clearly within the authority of adjudged cases, the duty of this court is imperative; it is one from which it dare not shrink, however much it may regret that this question has arisen.

It is but due, and of this the court is fully conscious, that the public officers should be sustained in the exercise of the powers which are granted them; but when appealed to, upon a question of individual rights, it can have no other duty but to apply the law to the case. It cannot be improper further to say, that in the prosecution of the work here complained of, it is beyond doubt that the board of commissioners have acted in the most perfect good faith.

A great variety of other questions have been raised and discussed, in the course of this laborious investigation. They have been intently and carefully considered, but not being material in the decision of this motion from the conclusion to which I have arrived, it is not deemed necessary to discuss them further in this preliminary stage of the cause.

The motion to dissolve the injunction must be denied.

Motion denied.

Devaux v. The City of Detroit.

Mary Devaux v. The Mayor, etc., of the city of Detroit.

Plat of Detroit: Power of common council to open streets. Complainant went into possession of a lot in Detroit, in 1809, and in 1821 received a conveyance of the same from the governor and judges of Michigan Territory. Nearly thirty years after she took possession, the common council of Detroit, on a claim that a street was laid out through the lot originally, proceeded to open the same. On bill filed for the purpose, *held*, that the council should be enjoined from opening the street until they had established their title at law. (a.)

Titles to land should be tried at law. A court of chancery is not the appropriate tribunal for the trial of titles to land. (b.)

Motion to dissolve an injunction. The case is sufficiently set forth in the opinion of the chancellor.

A. D. Frazer and J. A. Van Dyke for the motion.

D. Goodwin contra.

*THE CHANCELLOR.—The bill states that the complain- 100
ant and those under whom she claims, have been in possession of the lot since 1809; that it has been inclosed by a fence since that time, and that valuable improvements have been made upon it, etc.; that defendants are about proceeding summarily and without pursuing the forms of law, to pull down the fences and remove the buildings, etc.; that in addition to the possession, she holds the

(a.) The effect of the plan of the governor and judges in establishing streets in the city of Detroit, was much considered in *People v. Jones*, 6 Mich., 176, and *Tillman v. People*, 12 Mich., 401. In the former case it was held, that the plan did not, of itself, make public highway of that portion of the projected streets which was covered by private claims and occupied as private property, and in both cases it was decided that the plan alone did not establish a street without some act on the part of the public accepting the offered dedication. From both it is also inferable that the right to accept might be lost by lapse of time in connection with other circumstances, making it operate unjustly upon private lot owners.

(b.) See also *Blackwood v. Van Fleet*, 11 Mich., 282. It has, however, a jurisdiction conferred upon it to quiet the title of the party in possession; as to which, see *Howland v. Doty*, *ante*, p. 3, and cases cited.

14 387
13 370
24 368
41 426
42 646
43 673
Haring-
ton.
14 384
On 374

Devaux v. The City of Detroit.

lands by deed emanating from the governor and judges of the late Territory of Michigan, dated April, 1821.

The answer admits the possession, but sets up that Longdon, the grantor of the complainant, held a part of the land under a permission from the governor and judges, and that he took possession of the residue without authority, and that the deed of 1821 is uncertain in its description, and does not include the land in controversy, and that by the plan of the city said street was laid out sixty instead of fifty feet wide.

It is an admitted fact that the complainant and those under whom she claims, have been in possession and have had this property inclosed for nearly thirty years; and the question is, shall the defendants, after such a length of possession, be permitted to take forcible possession, and remove the fences and building, without first establishing their right by legal process?

It appears to me but just, that the complainant, after
101 such a *length of possession, should be protected in the enjoyment of this property until an adverse right be established.

It is urged that the governor and judges, being trustees, with defined powers, after having laid out and established the plan, had no authority, either to grant to any one the right to occupy a part of the street, or to grant the deed of 1821.

After ground had been dedicated and appropriated for a public street, and rights acquired with reference to the plan, they had no authority to appropriate it to a different purpose.

But it appears in this case, that the land in question was never used or appropriated as a street, and the dedication of it is attempted to be shown by reference to the plat, and on this ground the court is asked to dissolve the injunction, without any establishment of the right in opposition to a possession and improvement of thirty years.

The complainant seems to have acquired a confirmation of her claim by the deed of 1821, from the same board which is alleged to have established the plan of the city. It is said that this deed

Devaux v. The City of Detroit.

is imperfect, but it is manifest that it contemplated the same premises. There are cases where the abandonment of a street may be presumed by non-user. There having been a possession and improvement for so long a period; the land in question having never been used as a street, it would be obviously unjust to permit this forcible entry without the defendants first establishing a right at law. (See *Varick v. Corporation of New York*, 4 Johns. Ch., 53.) And this court is not the appropriate tribunal for the trial of titles to land. (*Abbott v. Allen*, 2 Johns. Ch., 521.)

The injunction must be continued until the defendants establish their right at law.

Motion denied.

Jones v. Disbrow.

Henry V. Disbrow v. DeGarmo Jones and others.

DeGarmo Jones v. Henry V. Disbrow and others. (Cross Bill.)

1h 100
1w 370
15 370
29 161
33 123
66 303

Fraud in conveyance: Laches in applying for relief. A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating it when discovered, and consistent in his notice to the opposite party of the use he intends to make of it. (a.)

Same: The principle applied. Where the complainant had rested for several months after he had knowledge of the fraud complained of, and until the condition of the property had changed, before he took any steps to rescind the contract, this court refused to interfere, and left the complainant to his remedy at law.

Foreclosure: Set-off by mortgagor of claim owing by mortgagee. Where land which was under lease for a term was sold, and a mortgage taken back for the purchase price, and it was agreed between the parties that during the leasehold term, the mortgagee should pay to the mortgagors the interest on the purchase price; *held*, that on a foreclosure of the mortgage the amount of this interest should be deducted from the amount due on the mortgage, and a sale be decreed for the balance only. (b.)

For a general statement of the facts in the first of these cases, see *ante*, p. 48.

In that case Jones was proceeding to foreclose a mortgage by advertisement, under the statute, and Disbrow, claiming an undivided interest in the mortgaged premises as purchaser from one of the mortgagors, filed his bill and obtained an injunction, restraining the foreclosure. On the coming in of answers to this bill, the injunction was dissolved. Jones then discontinued the

(a.) See for the same principle, *Street v. Dow*, *post*, 427; *McLean v. Barton*, *post*, 279; *DeArmand v. Phillips*, Wal. Ch., 186; *Campau v. Van Dyke*, 15 Mich., 371; *Story Eq. Juris.*, § 1520-1522.

(b.) In *Detroit and Milwaukee R. R. Co. v. Griggs*, 12 Mich., 45, it was decided that one who had given a mortgage for the purchase price of lands which were conveyed to him with a covenant against incumbrances, is not confined to his remedy upon the covenant, but may set off the amount of a prior mortgage, which he has paid, against his own mortgage when suit is brought to foreclose it. See this case as to set-off generally in equity; also *Lockwood v. Beckwith*, 6 Mich., 168; *Hale v. Holmes*, 8 Mich., 87; *McGraw v. Pettibone*, 10 Mich., 530.

Jones v. Disbrow.

proceedings to foreclose by advertisement, and filed his bill, December 6, 1837, for foreclosure in equity.

The bill is in the usual form, against the mortgagors, and states that Disbrow, some time after the sale of the mortgaged premises by Jones to the mortgagors, acquired by purchase of the mortgagors, or some one of them, an estate and interest in an undivided part of said premises, the same being conveyed to him in fee simple; that said Disbrow, by such purchase and conveyance, claimed to be the owner of the undivided three-fourth parts of said premises. 103

The bill alleged that at the time of such purchase and conveyance, Disbrow was fully informed of the bond and mortgage, and of Whiting's lease; that he was notified of the lease by Thompson, and also had notice thereof from other sources, and purchased and acquired the interest which he held in the premises, subject to Whiting's lease; that Whiting was, at the time of the purchase and conveyance to Disbrow, in the actual possession and occupation of said premises, under and by virtue of the lease, and that Disbrow knew of the indorsement on the lease extending Whiting's term to February 1, 1839.

July 23, 1838, the bill was taken *pro confesso* as to all the defendants except Disbrow, who answered. The answer admits the sale of the premises by Jones, the bond, mortgage, lease and agreement; also, the possession, by Whiting, of the premises, but denies that he, Disbrow, knew the terms of the lease, or had any knowledge of the special agreement reciting the extension of the term to Whiting, until his purchase, but states that after his (Disbrow's) purchase of Thompson, Thompson drew from his pocket and gave him that agreement.

D. Goodwin, for complainant.

Woodbridge & Backus, for defendant Disbrow.

THE CHANCELLOR.—The most important points in the first of the above cases were decided upon the motion to dissolve the

Cooper v. Alden.

made; that notice should then be given, and after hearing those interested, the commissioners should then proceed to establish such routes, and file in the office of the secretary of state, accurate plans of such surveys and locations. That, as it is alleged in the bill, and there being no answer, of course no denial, that the extension complained of was ordered by a resolution, merely to make this extension according to the terms of the lease, and alleged to have been done without law or right, and without observing the mere forms of law; that the proceeding is irregular, and the parties cannot show it to have been legally done by reference to the statute merely, but must show affirmatively and positively, by way of answer, that they have pursued its forms and kept within the powers granted.

After the views expressed on other points in this case, it may not be very material for the purposes of this motion to decide this question. But, as it may be convenient as a question of practice, it may be proper to express my views upon this point. This is a motion to dissolve an injunction without answer, and for want of equity in the bill.

So far as the statute, which is a public law, goes to show
94 *that the acts of the commissioners, as set out in the bill, are within their powers, and to be exercised in the manner therein stated, so far is it competent to show by it, they are lawfully authorized to perform the acts they are alleged to have performed, and that the complainants have no just cause of complaint, and that hence results a want of equity in the bill.

It has been further said in the argument, that the legislature, by their act of April 6, 1838, have themselves put a construction upon the powers of the commissioners, and that further legislation was necessary to authorize a further extension of the railroad from its present termination.

This act provides that the commissioners are hereby authorized, with the consent of the common council of the city of Detroit, to extend the tracks of the Central railroad from its present termination down Woodward avenue to its intersection with Atwater

Cooper v. Alden.

street, and thence each way along said Atwater street as far as said commissioners may deem best for the public good, etc.

This may not be of decisive consequence in the decision of this question, but it certainly may be regarded as confirmatory of the views heretofore expressed of the proper construction of the general powers of the commissioners. The commissioners themselves, by asking and obtaining a lease of the city, and by the uncontradicted allegations of the bill, acting in pursuance of it, and making it the basis of their proceeding in this matter, seem to have taken the same view of their powers.

But it is said that whatever views may be taken of the powers under which the commissioners acted, still the complainants have not made a case of such an interference with their rights, as calls for the interposition of this court by injunction.

It must be remembered that the allegations contained in the bill are not denied, and that, for the purposes of this argument, they must be taken as true, as admitted.

In regard to the injury, the bill alleges, in substance, that the complainants, and those under whom they claim, have been in possession for more than twenty-five years; that the complainants have laid out large sums of money in erecting buildings, *and preparing residences for themselves and their fami- 95 lies; that the obstructing said street by buildings and permanent fixtures would render the complainants' premises uncomfortable, inconvenient and unsafe, in proportion as the said street should be contracted or obstructed; and that, should said avenue be permanently contracted, their plans of making said premises a place of residence would be wholly defeated, and they would be compelled, to their great loss and damage, and in violation of their vested rights, either to suffer hazard, inconvenience, annoyance and wrong, or to abandon their improvements, made on said premises, and seek elsewhere a place of residence.

That if said building shall be erected, as contemplated by said lease, it will greatly encumber, block up and obstruct the free use of the same; and will extend across the entire front of lot 42, and

Cooper v. Alden.

made; that notice should then be given, and after hearing those interested, the commissioners should then proceed to establish such routes, and file in the office of the secretary of state, accurate plans of such surveys and locations. That, as it is alleged in the bill, and there being no answer, of course no denial, that the extension complained of was ordered by a resolution, merely to make this extension according to the terms of the lease, and alleged to have been done without law or right, and without observing the mere forms of law; that the proceeding is irregular, and the parties cannot show it to have been legally done by reference to the statute merely, but must show affirmatively and positively, by way of answer, that they have pursued its forms and kept within the powers granted.

After the views expressed on other points in this case, it may not be very material for the purposes of this motion to decide this question. But, as it may be convenient as a question of practice, it may be proper to express my views upon this point. This is a motion to dissolve an injunction without answer, and for want of equity in the bill.

So far as the statute, which is a public law, goes to show
94 *that the acts of the commissioners, as set out in the bill, are within their powers, and to be exercised in the manner therein stated, so far is it competent to show by it, they are lawfully authorized to perform the acts they are alleged to have performed, and that the complainants have no just cause of complaint, and that hence results a want of equity in the bill.

It has been further said in the argument, that the legislature, by their act of April 6, 1838, have themselves put a construction upon the powers of the commissioners, and that further legislation was necessary to authorize a further extension of the railroad from its present termination.

This act provides that the commissioners are hereby authorized, with the consent of the common council of the city of Detroit, to extend the tracks of the Central railroad from its present termination down Woodward avenue to its intersection with Atwater

street, and thence each way along said Atwater street as far as said commissioners may deem best for the public good, etc.

This may not be of decisive consequence in the decision of this question, but it certainly may be regarded as confirmatory of the views heretofore expressed of the proper construction of the general powers of the commissioners. The commissioners themselves, by asking and obtaining a lease of the city, and by the uncontradicted allegations of the bill, acting in pursuance of it, and making it the basis of their proceeding in this matter, seem to have taken the same view of their powers.

But it is said that whatever views may be taken of the powers under which the commissioners acted, still the complainants have not made a case of such an interference with their rights, as calls for the interposition of this court by injunction.

It must be remembered that the allegations contained in the bill are not denied, and that, for the purposes of this argument, they must be taken as true, as admitted.

In regard to the injury, the bill alleges, in substance, that the complainants, and those under whom they claim, have been in possession for more than twenty-five years; that the complainants have laid out large sums of money in erecting buildings, *and preparing residences for themselves and their fami- 95
lies; that the obstructing said street by buildings and permanent fixtures would render the complainants' premises uncomfortable, inconvenient and unsafe, in proportion as the said street should be contracted or obstructed; and that, should said avenue be permanently contracted, their plans of making said premises a place of residence would be wholly defeated, and they would be compelled, to their great loss and damage, and in violation of their vested rights, either to suffer hazard, inconvenience, annoyance and wrong, or to abandon their improvements, made on said premises, and seek elsewhere a place of residence.

That if said building shall be erected, as contemplated by said lease, it will greatly encumber, block up and obstruct the free use of the same; and will extend across the entire front of lot 42, and

Bank Commissioners v. The Bank of Brest.

1838, payable at the Phoenix bank, of the city of New York, one year from date, bearing an interest of seven per cent; that all of said post notes were issued without having been indorsed by a bank commissioner, in violation of the forty-first section of the "Act to amend an act entitled 'An act to organize and regulate banking associations, and for other purposes,' approved December 30, 1837;" and that said bank had failed to comply with section 36 of the last mentioned act, in furnishing the securities to the amount required.

The bill charged the bank to be insolvent, and prayed for an injunction, and for the appointment of a receiver to take charge of its property and effects; also, for a decree to deprive said bank of its corporate privileges, and a dissolution of the corporation.

The bill was filed and injunction issued August 15, 1838; injunction and subpoena served on the 16th of the same month.

The answer admitted the facts as stated in the bill, but denied that the bank was insolvent, and insisted that its assets, if no unexpected loss occurred in collecting them, would fully discharge all its liabilities.

108 *The answer further stated, that from various difficulties and disappointments, and more particularly from the impossibility, under the circumstances of the case, of perfecting its securities, its president, directors and company concluded to close its affairs, and on the fourteenth day of August, 1838, passed the following preamble and resolution: "Whereas, from various disappointments in the receipt of money, and from other unforeseen and embarrassing circumstances, it is impossible for the bank of Brest to redeem, upon demand, all its notes and bills in circulation, and to pay its other debts; and whereas, unexpected difficulties have arisen in perfecting its securities required by law for the above bank, and the further transaction of its business is exceeding inconvenient; therefore, resolved, that all the choses in action, and personal and real estate, and all the effects and assets whatever of said bank, be assigned and transferred to Alexander D. Frazer, Esq., of Detroit, and Theodore Romeyn, Esq., or either

Bank Commissioners v. The Bank of Brest.

of them (if one shall decline), in trust, for the purpose of paying all the debts of said bank, as soon as may be, according to the statutes of the State; that a deed of assignment be forthwith prepared in pursuance of the above resolution, and that the cashier affix thereto the seal of the bank, and that the same, when so sealed by the said cashier, shall be considered as the deed of the bank."

That Theodore Romeyn having declined the trust, the bank did, on the fifteenth day of August, execute to Alexander D. Frazer, Esq., an assignment of all its credits and effects, which assignment was in pursuance of the foregoing resolution, and was executed and delivered prior to the issuing of the injunction, and with no knowledge or notice thereof. That said trust was accepted by said Frazer, and that he, by virtue of said assignment, took possession of all the property and effects of said bank, and removed the same previous to the service of said injunction. That the assignment was executed in good faith, etc.

P. Morey, attorney-general, in support of the motion.

*1. The directors of such a corporation as the bank of 109 Brest may assign property to pay a debt, or for any other lawful purpose which will promote the objects contemplated by the charter; but they cannot make an assignment merely for the purpose of closing its existence, as that would be the exercise of a power not delegated by law, and would, in effect, accomplish a surrender of their chartered rights to another power than that by whom their privileges and franchises were bestowed. See *session laws of 1838*, page 31, section 17, of the "act to amend the act to organize and regulate banking associations, and for other purposes;" where the powers of directors are limited to such acts as "appertain to the business of a banking association."

2. The "act to create a fund for the benefit of the creditors of certain moneyed corporations," provides the mode in which all corporations subject thereto shall be proceeded against on their becoming insolvent, or for any violation of law. It is made the

 Bank Commissioners v. The Bank of Brest.

imperative duty of a bank commissioner, immediately upon the ascertainment of any violation of law or insolvency, to apply to the court of chancery, upon bill or petition, for an injunction ; and it is declared that the same proceeding *shall, in all respects*, be had, as in cases of application by the attorney-general. (See *session laws of 1835-6, page 162, section 18.*) Section 9, page 159, of the same law, further provides, when a corporation shall become insolvent, and shall have been proceeded against as above, "it shall be the duty of the court of chancery, immediately after a final dividend shall have been made, to cause an order prescribing certain rules to be entered in its minutes," shows clearly, anticipating and intending that what was imperatively enjoined as an official duty upon the bank commissioner, would be performed in good faith, and that full force and effect would be given by the court of chancery to what is thus required.

All of this, an assignment such as is now presented, and relied upon to defeat the motion, would prevent. It would render the law nugatory, and place the bank commissioner in the strange predicament of being imperatively required by statute

110 *to perform an act in the furtherance and promotion of the public interests, through the medium of the court of chancery, and yet left powerless to enforce what was there enjoined ; and subject too to be defeated by an act itself a fraud upon individual rights, and a clear violation of the spirit and intention of the law.

T. Romeyn, contra.

I. The act of 21st June, 1837, entitled "An act to provide for proceedings in chancery against corporations, and for other purposes," does not render it *imperative* upon the chancellor to issue an injunction and appoint a receiver.

1. The words of the statute are, that in certain specified cases the chancellor *may* grant an injunction and *may* appoint a receiver. These words imply a *discretionary* power.

2. This statute, so far as it alters the common law, should be *strictly* construed. (*1 Kent, 433*)

Bank Commissioners v. The Bank of Brest.

3. The bestowal of jurisdiction upon the court of chancery is an infringing upon the common law, for by it the control of corporations was intrusted to courts of law, and chancery could not interfere. (*2 Johns. Ch.*, 371; *Id.*, 389; *Hopk.*, 354.)

4. Again. The granting of an injunction is *always discretionary*. (*2 Johns. Ch.*, 202, 379.) So is the appointment of a receiver. (*1 Johns. Ch.*, 57.)

II. The present case does not require the appointment of a receiver.

1. The bank has made an assignment of all its effects.

2. The act of assignment is legal.

First. It will not be pretended but that the bank might close its affairs when it pleased, by a surrender of its franchises. This is incident to every corporation. (*1 Blk. Com.*, 485.) An assignment is a mutual surrender. (*19 Johns.*, 456; *6 Cow.*, 220.)

Second. It had a right to make such surrender, or close its affairs in this particular way. (*4 Mass.*, 293; *2 Kent*, 227; *1 Blk. Com.*, 475; *6 Cow.*, 219; *3 Wend.*, 1.)

**Third.* This particular assignment is valid in all its 111 provisions. If *any* are legal the court will not interfere. (*5 Paige*, 318.)

3. While this assignment subsists, the court may not remove the trustee unless under special circumstances of irresponsibility, neglect or abuse of trust, etc., which are not here pretended to exist. (*6 Johns. Ch.*, 161; *Hopk.*, 429; *1 Paige*, 17; *2 Paige*, 438.)

4. While the assignment remains in force, and the trustee acts under it, there is no duty for a receiver to perform.

First. The assignee of the bank has already in his possession and control all the property which would vest in the receiver, by the fifth section of the act under which the court exercises jurisdiction.

Second. The securities which have been given under the sixth section of the act amending the general banking law, are given to the auditor-general, for the use of the State, and cannot be transferred to the receiver.

Bank Commissioners v. The Bank of Brest.

THE CHANCELLOR.—From the facts which appear in the bill and answer, in this case, there can be no doubt that the bank of Brest is insolvent within the meaning of the law, and that a proper case is made for the appointment of a receiver to take charge of its effects.

The question as to the validity of the assignment is not regularly before the court, the assignee not being a party; but both parties and the assignee are anxious to obtain an expression of opinion upon this point.

The assignment set up in the answer is an assignment by the directors of all the estate, real and personal, and assets and effects of the bank, to a trustee. A transfer by way of security of a portion of its effects for the purpose of carrying on the concern is within the power of the directors; and a corporation which has no particular mode pointed out for closing its concerns may make an assignment on obtaining the assent of the stockholders. If this assignment is valid, it is no doubt a surrender of the charter; for

if a corporation suffers acts to be done which destroy the
112 end and object for which it *was instituted, it is equivalent to a surrender of its rights. (*Slee v. Bloom*, 19 Johns., 456; *People v. The Bank of Hudson*, 6 Cow., 219.)

The directors, in making the assignment in question, without authority from the stockholders, have exceeded their powers.

They are made trustees of the stockholders, for the purpose of carrying on the business of the corporation, and not for the purpose of winding it up and destroying its existence. (*Angel and Ames on Corp.*, 507; 3 Des., 557.)

The statute prescribes the manner in which the affairs of this class of corporations shall be wound up in case of insolvency. This forms a part of the security to the public, and is one of the conditions upon which they take their chartered powers. An assignment made manifestly with a view to evade the provisions of the statute, as this seems to have been, is against the policy of the law, and cannot be sustained.

Motion granted.

Wadsworth v. Loranger.

Noyes W. Wadsworth v. Joseph Loranger.

Mortgage by deed absolute in form: Parol evidence to show intent. A deed absolute in form may be proved by parol to have been intended by the parties to operate only as a mortgage for money loaned at its date; and such proof will entitle the grantor to redeem.

Redemption against subsequent purchaser. Where the grantee in such a deed sells and conveys to one who has full notice of all the facts, such second grantee will take no greater interest than his grantor had in the premises, and he will hold them subject to be redeemed on payment of the amount due on the mortgage. (a.)

Attorney: Privileged communications. A statement of fact made by an attorney to his client, and which apprises the client of equities in a third party, is not a privileged communication, and may be proved by the attorney.

Costs on redemption. Where one purchases lands with knowledge that his grantor holds it in security for a loan, and refuses to receive payment of the loan when tendered, and puts the party entitled to redeem to the expense of a suit for the purpose, he will be compelled to pay costs.

This was a bill to redeem from the defendant a tract of land conveyed by Antoine Laselle to Thomas Bell, as a security for \$150 loaned, and interest, September 20, 1829, by a deed absolute on the face, but by agreement at the time merely a security for the \$150 and interest, payable in one year.

The bill sets forth the agreement as above stated, and the deed of that date, September 20, 1829, under the agreement; that Bell, when the money became due, had left the country, and it was not

(a.) The doctrine of this case was reviewed and affirmed by the supreme court in *Emerson v. Atwater*, 7 Mich., 12, where the cases on the subject in other States are referred to and discussed by counsel. The court, however, did not in that case discuss the question at length on principle, but contented themselves with referring to the injustice that would be done by overruling a case which had for considerable time been received as settling a rule of property, and with saying that if they thought it erroneous in principle—which they did not—they believed it would be both better and safer to leave it to the legislature to correct the error, than for the court to undertake it, as all intervening rights would in that case be saved, and injustice be done to no one. As bearing upon the same point, see *Batty v. Snook*, 5 Mich., 231, and *Enos v. Sutherland*, 11 Mich., 538. See also 3 Leading Cases in Equity, Hare and Wallace's Notes, 606, 625, 630.

Wadsworth v. Loranger.

known where he was or could be found; that Laselle was then ready and desired to pay the money and interest; that Laselle died about January 1, 1832, and Wolcott Lawrence was appointed his administrator; that about December 8, 1832, he was empowered to sell the real estate of Laselle to pay debts; the premises in question were sold to complainant for \$2,129.90, paid by him, and January 7, 1833, a deed was duly executed to him; that the premises were sold subject to the mortgage, and complainant has been ever ready to pay the amount due; that Loranger, the defendant, with full knowledge of the nature of the conveyance to Bell, and the agreement with him, obtained privately and fraudulently from Bell a deed of the premises. The bill further alleges a continued and uninterrupted possession in Laselle, his representatives and the complainant.

The answer denies any knowledge of the transactions set forth in the bill, showing the deed to Bell to have been a mortgage, *and also of the derivative title of complainant from the representatives of Laselle. It admits the possession of the premises to have been always in Laselle and his representatives.

D. Goodwin, for complainant.

A. D. Frazer, for defendant.

THE CHANCELLOR.—The facts are briefly these: About the 20th of September, 1829, Antoine Laselle obtained from Thomas Bell a loan of \$150 for one year, and for security gave a deed of the premises in question. That before the expiration of the time, Bell absconded, and his residence has not since been known. That Laselle has since died; that the property was sold and conveyed to complainant by the administrator of Laselle, subject to this incumbrance, on the 7th day of January, 1833. That defendant knew all these facts, but yet afterwards, on the 5th of March, 1836, procured a deed from Bell. Loranger, the defendant, denies all knowledge of the fact that the deed from Laselle to Bell was a security for a loan.

Wadsworth v. Loranger.

But from the continued possession of Laselle and his representatives, the proceedings in the attachment suit, which form a part of the exhibits in this cause, in which Laselle, in answer to the attachment, states the facts under oath, and in which suit Loranger was a party, from the evidence of Wolcott Lawrence, who states that he explained at that time the circumstances to the defendant, and from the positive evidence of Warner Wing, Esq., there can be no doubt that he was a purchaser with notice. It was objected to the testimony of Lawrence, that his evidence was a professional secret, and therefore ought not to be received. But it is not a communication *from the client 115 to the attorney, but information from the attorney to the client, informing him of the nature of Bell's title. It was information which, as an honest man, he was bound to give, and which he is now not only competent but bound to disclose. That a deed absolute in its terms may be proved by parol to have been intended by the parties to operate only as a mortgage, cannot admit of a doubt. (See *Strong et. al. v. Stewart*, 4 Johns Ch., 167; *James v. Johnson, etc.*, 6 Johns Ch., 417; *Van Buren v. Olmstead et al.*, 5 Paige R., 9.)

The facts then being ascertained, and of these there can be but little doubt, it only remains to apply the law to the case, and in this there is little difficulty.

I must, therefore, declare that this deed, though absolute on its face, is only valid as a mortgage for the security of the loan from Bell to Laselle, and that Loranger, being a purchaser with notice, can take no greater interest than Bell had in the premises, and that the complainant is entitled to redeem by the payment of the amount due, which by the testimony of Lawrence and Durocher, is proved to have been one hundred and fifty dollars at the date of the deed.

As to costs, Loranger purchased with a knowledge of the facts; he was wrong in refusing the money when tendered, and by denying any knowledge of the nature of Bell's title has put the complainant to the expense of proving his bill. The complainant is therefore entitled to recover his costs.

Barnum v. The Bank of Pontiac.

Hiram Barnum v. The Bank of Pontiac.

Injunction against bank, what not sufficient cause. By the act incorporating a bank a previous act was referred to, and in effect made a part thereof, which provided that if any bank did not pay its notes on demand, the charter should not for that cause be dissolved, but it gave the bank sixty days within which to redeem its notes. It contained further provisions that the act should not prevent the issuing of an injunction, and that one might be issued when any bank should refuse to pay its debts. *Held*, that these provisions relative to injunctions did not change the previous law on that subject.

The provision that an injunction might be issued on a failure to pay was not imperative, but left it to the sound discretion of the court, upon a proper case being made.

Where a bill alleged merely a demand and refusal by the bank to pay its notes, and contained no allegations of any impending mischief, danger or hazard of the rights of complainant, an injunction was refused.

Effect of injunction against a bank. An injunction against a bank goes to prevent all action whatever, and is rather in the nature of a final injunction which is sometimes granted at the termination of a cause, than the usual injunction to prevent some particular mischief.

Cause for injunction against bank: Notice. Except in cases where the bill is filed by a bank commissioner, showing fraud, violation of the charter, or insolvency, notice should be given of an application for an injunction against a bank, and a case should be made out that would warrant the court to wind up the concerns of the bank. (a.)

Motion for an injunction. The facts are sufficiently stated in the opinion.

Wm. Hale and P. Morey for the motion.

Bates & Walker contra.

120 *THE CHANCELLOR.—This application is founded upon the act of June 21, 1837. This bill alleges merely a demand and refusal to pay. It contains no allegations of any impending mischief, danger or hazard, of the rights of the complainant.

(a.) See the cases of *Attorney-General v. Oakland County Bank*, Wal. Ch., 60, and *Attorney-General v. Bank of Michigan*, *post*, 315, for the general principles governing the court in granting injunctions against banks on the application of the proper public officer.

It presents no one of the ordinary features required to authorize this summary interposition, according to the general principles of proceedings in chancery.

In the act of incorporation of the bank of Pontiac, the act of April 23, 1833, is specially referred to, and in effect is made a part of its charter. That act provides, if any bank shall not pay its notes on demand, the charter shall not, for that cause, be dissolved, and gives such bank sixty days within which to redeem its notes. It further contains a provision that that act shall not prevent the issuing of an injunction. It may become *necessary to examine for what causes an injunction could 121 have been issued under that act.

Very clearly, the mere provision that the "act should not *prevent* the issuing of an injunction" does not change the law or the practice of the court in this respect.

It may, therefore, be premised that the legislature contemplated that a case should be made which would authorize the exercise, according to the course and practice of this court, of this summary interposition.

The act of June 21, 1837, which is relied upon in this application, provides that an injunction *may* be issued, when any banking institution shall refuse to pay its debts.

It has been urged that the act last mentioned is imperative; that whenever there is a demand and refusal to pay, the injunction must issue of course. To act upon this construction would lead to results so variant from the uniform course of equity proceedings, that the court must pause before adopting it.

1. It would open the door to collusion.
2. It would almost invariably lead to unjust and inequitable results.

If the construction contended for of the act of 1833, and the act last mentioned, shall obtain, that an injunction must be granted on demand and refusal, and that upon payment of the amount claimed in the bill and twenty per cent in sixty days, the injunction shall be dissolved, the most probable result would be that

Barnum v. The Bank of Pontiac.

the bank enjoined, struggling for existence, will within the limited period redeem the amount claimed by the bill, although by doing so it would be unable to pay the remaining creditors of the bank; and this under the direction of the court. But it is still bound by the statute to become an accessory in enforcing this unjust distribution.

There are other objections to which this construction would lead. From the statutes and from the settled practice, a legal discretion in this as in other cases, must be exercised. This being granted, how shall this be done, or rather what rule, applicable alike to all cases, shall be adopted. In view of the difficulties¹²² and consequences which have been before alluded to, I know of no better rule than the usual test, where an injunction is asked, in the first instance, to require that a case shall be made showing immediate danger or some impending mischief. From this it will follow that the application in this case must be denied.

It has been contended that the act of 1837 is so far *ex post facto* in its operations that it must be regarded as unconstitutional, and therefore of no validity so far as regards the banks subject to the law of April 23, 1833. After arriving at the conclusion before stated, it may not, perhaps, be necessary to consider that question.

Without saying that it is unconstitutional, and I am as yet unable to come to that conclusion, it is for the present sufficient to say that it would operate with great severity upon the banks, and with great inconvenience to the public, if the act of 1837 is regarded as imperative; if an injunction must issue at all events when a bank shall refuse to pay any one of its notes.

It is stated by the chancellor, in the case cited in *Hopkins*, 591, that these are rather in the nature of the final injunctions that are sometimes granted at the termination of a cause, than the usual injunctions to prevent some particular mischief. An injunction against a bank goes to prevent all action whatever. It is, for the time being, an utter prostration of all its powers. Hence,

except in cases where the bill is filed by a bank commissioner, showing fraud, violation of the charter or insolvency, courts require notice, and proceed with caution. And it seems to me that it is not too much, and is consistent with the discretion which the court is bound to exercise, to require such a case to be made, as would authorize the court, if it prove true and according to the exigency of the case, to wind up the concern, and make an equal distribution of the assets among all the creditors.

This may be made out by immediate pending insolvency, and therefore danger to all the creditors; or such danger of a misapplication of the funds belonging to the bank as would *require the interposition of the court for the safety of its 123 creditors.

The decision upon the other points made in the argument, as well as the point last referred to, and also upon what precise state of facts this court would feel itself bound to proceed and wind up this or any other bank, will be more appropriate when the case shall have been heard upon the presentation of such facts before it.

Motion denied.

McMurtrie v. Bennette.

Richard McMurtrie and another v. John Bennette and others.

1h 124
1h 859
29 170
31 80
33 400
41 290
47 484
1h 134
86 96
Harring'a
1h 124
96 567

Specific performance discretionary. Courts of equity do not, as a matter of course, decree specific performance of contracts for the conveyance of lands, but they exercise a discretionary power in view of all the facts of the case; and their discretion must not be arbitrary and capricious, but regulated on grounds that will render it judicial.

Contract must be mutual. The contract sought to be enforced must be mutual, and the tie reciprocal, or a court of equity will not enforce a performance. (a.)

Contract must be certain. A parol contract will not be enforced unless it is certain in all its essential particulars. (b.)

What part performance will take case out of statute. If a party sets up part performance to take a case out of the statute of frauds, he must show acts unequivocally referring to and resulting from that agreement, such as the party would not have done unless on account of that very agreement, and with a direct view to its performance: and the agreement set up must appear to be the same with the one partly performed—there must be no uncertainty or equivocation in the case.

On what grounds performance of parol contracts decreed. The ground of the interference of courts of equity to enforce specific performance, is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed.

Part payment of purchase price not enough. Part payment of the purchase price is not, of itself, sufficient to warrant a decree for the specific performance of a parol contract for the purchase of lands: but it *seems* that full payment would be. (c.)

(a.) See *Hawley v. Shelden*, *post*, 420. In the case of *Chambers v. Livermore*, 15 Mich., 381, the court denied specific performance of a written contract, because by its terms it gave the complainant an unfair advantage. See also *King v. Hamilton*, 4 Pet., 311; *Western R. R. Corp. v. Babcock*, 6 Met., 346; *Eastland v. Van Arsdale*, 3 Bibb., 274.

(b.) See *Millard v. Ramsdell*, *post*, 373, and *Bomier v. Caldwell*, 8 Mich., 463, cited in note, *ante*, 65.

(c.) This case is authority to the point that part payment of the purchase price will not alone take the case out of the statute; but the *dictum* that full payment would, is opposed to the following among other cases. *Rhodes v. Rhodes*, 3 Sandf. Ch., 279; *Parker v. Wells*, 6 Whart., 153; *Sites v. Keller*, 6 Ohio, 483; *Hatcher v. Hatcher*, 1 McMul. Ch., 611; *Johnston v. Glancy*, 4 Blackf., 94.

McMurtrie v. Bennette.

The bill in this case was filed to compel the specific performance of a parol agreement to convey land.

The bill states that John Bennette, one of the defendants, in a conversation had with complainants, in the month of May or June, in the year 1834, verbally agreed to sell and convey to the complainants a certain lot of land, containing eighty acres, for the sum of one hundred and fifty dollars, a part to be paid in money, and the remainder in a certain order drawn upon a man in the State of New York; that complainants paid Bennette, at the time, four dollars; that a deed was soon to be made for the premises; that instead of reducing the agreement to writing, Bennette gave the complainants the duplicate receipt for the land, which he had received at the time he purchased the land of the government, saying, at the same time, that that receipt was as good as an article, for he, Bennette, could not sell the land without it; that Bennette put complainant in possession, and he had made improvements, etc., that *afterwards Ben- 125
nette made a deed to complainants of the premises, but did not deliver it; that about a week afterwards, Bennette sold and conveyed the land to defendant, Jameson, through his, Jameson's, agent, Powell Grover, one of the defendants; that Grover knew of the previous sale by Bennette to complainants, when he purchased for Jameson; the complainants offered to perform the contract on their part, and demanded a deed.

The bill further stated that Jameson had deeded the premises to Grover, and prayed a decree for specific performance, and also contained a prayer for other relief, etc.

The answer of Grover admits the bargain between Bennette and complainants, but denies that the four dollars was paid towards the land; states that the four dollars was borrowed by Bennette, and that he had offered to repay it; admits that Jameson offered to purchase the land of Bennette, in June, 1834, in his presence, and that Bennette told him that he had made a contract or bargain for the lands with complainants; admits his being Jameson's agent, to purchase the land, in case the same

McMurtrie v. Bennette.

should not be conveyed to complainants; states that Bennette called on Grover June 24th, 1834, and stated that complainants had not complied with their contract to purchase the land, and that Bennette then offered to sell the land, and that he, Grover, purchased it for Jameson; that he inquired of complainants respecting their agreement to purchase, and their answer satisfied him that they had abandoned the contract; admits the deed to Jameson, and its record, and also the improvements by complainants; admits that he purchased from Jameson, March 4, 1836, for \$500; denies any knowledge of complainants' having any equitable title at the time he purchased from Jameson, and claims the benefit of the statute of frauds.

The cause was heard on bill, answer and testimony.

J. W. Jewett, solicitor for complainants.

J. H. Preston, for defendants.

126 *THE CHANCELLOR.—It is not a matter of course to decree specific performance of contracts. It requires a sound discretion, upon a view of all the circumstances; and this discretion must not be arbitrary and capricious, but must be regulated upon grounds that will make it judicial. (*Seymour v. Delancy*, 6 Johns. Ch., 222; *same case*, on appeal, 3 Cowen, 505.)

The contract or agreement sought to be enforced, must be mutual, and the tie reciprocal, or a court of equity will not enforce a performance. (1 *Mad. Ch.*, 423; 1 *Johns. Ch.*, 282, 378.) Here the contract rests entirely in parol. The letter given in evidence, is too uncertain to form the foundation of any proceeding; it specifies no land, nor any price, and nothing can be drawn from it as referring to the land in question.

The contract, in order to be enforced, must be certain in all its essential particulars. There is none of that certainty shown in the contract or agreement here sought to be enforced, which is necessary to enable this court to decree a specific performance.

If a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to

McMurtrie v. Bennette.

and resulting from *that* agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case.

The ground of the interference of this court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed. (*Phillips v. Thompson*, 1 Johns. Ch., 131.)

If this case can be sustained at all, it must be on the ground of part performance, for there is clearly no such written contract or agreement as can be enforced by this court.

The question then recurs, was there such a specific, definite verbal contract as can be enforced, and has there been such a *part performance, and readiness to fulfill, on the 127 part of the complainants, as will take this case out of the operation of the statute of frauds, and render it the duty of this court to decree a specific performance? It seems to me not. The improvement I regard as out of the question, so far as that may be sought to make a part of the performance and fulfillment. It is pretty clear, that whatever was done in this way, was not done until after the conveyance to Jameson, and it was only done with a view to its effect upon these proceedings. From the testimony of Green and Sewel, confirmed by the other witnesses, it is to be inferred that there was a parol contract for the sale of the land in question; but this, it is equally apparent, must have been conditional; that is, that the defendant, Bennette, would convey the land upon condition that the complainants would pay to him the purchase price. There was no such mutual undertaking on the part of the complainants as would have enabled Bennette to compel them to pay the money at any definite time. But it must be inferred that the agreement was to convey the land upon the return of Bennette from Jackson, if they would then pay him the consideration.

There is some discrepancy as to the intention of the payment of

McMurtrie v. Bennette.

the four dollars. But I am inclined to think that both parties intended at the time that this should apply in part payment.

It has been held, that even full payment of the purchase money is not sufficient, of itself, to take a case out of the statute. (*1 Mad. Ch., 381; and note (c).*)

But I am inclined to think the better opinion now is, that the payment of the whole of the purchase money, clearly in pursuance of a definite and mutual parol agreement, is sufficient to take a case out of the statute. But, I believe, it has uniformly been held, that the payment of a trifling amount, as was the case here, is not, of itself, sufficient. Indeed, if this were permitted in a case like the present, it would defeat all the beneficial objects of the statute.

But this application of the four dollars must, in the
128 nature of things, have been contingent; *that is, upon condition that the complainants entitled themselves to a conveyance of the land by performing, on their part, by the payment of the balance of the purchase money.

The ground on which the court acts at all, in these cases, is *fraud*, in refusing to perform *after* performance by the *other* party. The allowing any other construction upon the statute of frauds would be to make it a guard and protection to fraud. (*1 Mad. Ch., 378.*) This is the rule laid down in the books, and it is the true one. Let us apply it to the case before us. Here is not only an absence of all appearance of fraud, but of all temptation to commit it. It appears that Bennette had waited for the performance of complainants, away from home for a considerable time; that he had done all his part; that he was ready to make the complainants a title; that, on the day on which a conveyance was made to Jameson, he applied to one of the complainants, and then stated that he had waited four weeks for them; but that, if they would then fulfill the contract, he would not convey to Jameson; and he finally sold the land for five dollars less than, according to the bill, he was to have received of complainants.

It is true that the complainant, Henry, replied that he was ready to fulfill on his part, but he offered no payment nor made

McMurtrie v. Bennette.

any definite suggestion as to any payment. This was merely keeping the word of promise to the ear, and after so long a delay might have justly been treated by the defendant Bennette as such a failure to fulfill, on the part of complainants, as would absolve him. In the absence of all fraud and all temptation to commit fraud, I can see no other way of treating this matter. What other course was left? It would have been hard, indeed, to hold him longer in this state of uncertainty; it would be more severe, after the lands have been conveyed to a *bona fide* purchaser, and expensive improvements made by others, still to decree a specific performance.

I do not perceive any ground to impute fraud or unfairness to the defendant Grover, in this transaction. He swears positively it was purchased for Jameson and with his money; *that he left the agency with him because he could not 129 remain so long from home. It appears, too, that Jameson owned adjoining lands. Grover manifested no great anxiety to purchase, but it was placed on the ground that he would take it for Jameson if the McMurtries failed to pay. It is true Grover subsequently purchased this and the adjoining tract of land, but at an advanced price. Judges, of late, have regretted that the cases have gone so far in permitting part performance to take a case out of the statute, and have said that the courts ought to make a stand against further encroachments upon the statute of frauds. In these views I concur. Unless a stand is made, all the salutary objects of the statute will be lost sight of. Some other points were made in the argument, which are not necessarily involved, and perhaps I have already gone farther than is necessary; as, after all, the case turns principally on the entire absence of fraud on the part of the defendants, and the non-fulfillment on the part of the complainants; there is such a want of certainty and mutuality in this contract that it cannot be enforced. The complainants have failed to fulfill on their part. Decreeing a specific performance is an exercise of the powers of this court not *ex debito justitiæ*, but to be exercised upon a full view of the whole

McMurtrie v. Bennette.

case. There being an entire absence of fraud, and, so far as can be ascertained from the case, the failure of the contract having been caused by the non-fulfillment of the complainants themselves, they have not made such a case as calls upon this court to interfere and decree a specific performance, but that the parties should be left to their remedy at law. The bill must be dismissed with costs.

Bill dismissed.

McMurtrie v. Bennette.

case. There being an entire absence of fraud, and, so far as can be ascertained from the case, the failure of the contract having been caused by the non-fulfillment of the complainants themselves, they have not made such a case as calls upon this court to interfere and decree a specific performance, but that the parties should be left to their remedy at law. The bill must be dismissed with costs.

Bill dismissed.

Bernard v. Bougard.

Hyacinth Bernard dit Lajore v. The Heirs of Antoine Bougard and others.

Settling equities under government grant. After a confirmation of a claim to land by the board of land commissioners under an act of congress, and after patent issued, if competent at all for this court to go behind the patent to settle conflicting claims, it should only be done on the clearest and most irrefragable proofs. (a.)

Contract to mislead land board immoral and void. If two persons, claiming joint possession of lands, enter into an agreement that a claim by them shall be presented to the government land board, in the name of one alone, and that when the claim is confirmed to him, he shall convey a part of the land to the other, is immoral as tending to mislead the land board, and therefore, *it seems*, void.

Resulting trust. Where two persons claim equities in lands, and one of them presents a claim thereto which is allowed by the government land board, there is no resulting trust in favor of the other which can be enforced in equity.

The bill in this case set forth that in January, 1793, Hyacinth Bernard dit Lajore and one Antoine Bougard took possession of and settled a certain tract of land on the north side of the river Raisin, in the county of Monroe, containing five hundred and sixty arpents, being four hundred and sixty acres, which they had jointly purchased of the Indians; that the possession was taken jointly and for their joint benefit, and the land was possessed and used in common; that while so possessed, they, at their joint expense, and for their mutual benefit, made permanent and expensive improvements; that they continued their joint occupancy and improvements till March 3, 1807, and long subsequently, and the land was invariably considered, held, improved and enjoyed as their common property; that about the time last

(a.) Where, however, lands are granted by the government, by treaty or otherwise to individuals, and the president unnecessarily issues a patent, and delivers it to a person not entitled, such patent is void, and may be so declared by the State courts. *Stockton v. Williams*, Wal. Ch., 120; Same case on appeal, 1 Doug. Mich., 546. And this notwithstanding it is issued under a special act of congress. *Campau v. Dewey*, 9 Mich., 381.

Bernard v. Bougard.

aforesaid, they came to a resolution for partition, and agreed to set off the easterly half to complainant, and the westerly half to said Antoine; that ever afterwards the easterly half was always taken as the separate property of complainant, and treated by both as such, and that he continued to occupy and enjoy the same in his own right, and exercised acts of ownership over it, and that his title was never disputed.

The bill further stated that complainant and said Antoine being ignorant of the proper course to be taken to obtain a confirmation of their title, neglected to prefer their claim until 1821, when some person advised them to put in their claim; that they did so under the act of congress entitled "An act to revive the powers of the commissioners for ascertaining and deciding on claims to land in the district of Detroit, and for settling the claims to land at Green Bay and Prairie des Chiens, in the Territory of Michigan," approved May 11th, 1820; that they

131 both prepared to go to Detroit *for that purpose, but at the suggestion of some one it was proposed, to save expense, that the whole lands should be confirmed to one, the expenses to be shared equally, and that that one should convey to the other his share; that said Antoine accordingly went to Detroit and made his claim, which was duly confirmed to him by the commissioners acting under the act of congress entitled "An act to revive and continue in force certain acts for the adjustment of land claims in the Territory of Michigan," approved February 21, 1823, and also by congress; that complainant continued in possession of his part until 1829, and he often called upon said Antoine to ascertain if the patent had been received by him; that in 1828, and before receiving the patent, said Antoine died, but that on the day previous to his death he called his children, or a part of them, together, informed them of complainant's rights in the premises, and enjoined them to convey to him; that the children afterwards, when called upon for a conveyance, did not deny complainant's right, but professed their willingness to make a deed when the patent should be received.

Bernard v. Bougard.

The bill then proceeds to allege that three of the five heirs-at-law of said Antoine, by separate conveyances made in the years 1829 and 1830, had each sold and conveyed an undivided fifth part of the whole land to one H. Disbrow, with intent to defraud complainant, and that Disbrow at the time of contracting therefor, and of receiving the deed or paying the purchase money, had full notice of complainant's rights, and afterwards surreptitiously and illegally got possession of the lands. *Also 132 that the other two heirs in 1830 each sold and conveyed an undivided one-fifth part of the whole land to one Robert Clark, and that Clark bought and received deeds with the like full notice of complainant's rights. The bill further charges that a patent was issued for the land in 1829 or 1830, to said Antoine or to some one or more of his heirs, the complainant being unable to state particulars, as the heirs have it; and the bill asks for the production of the patent, prays that said Disbrow and Clark be decreed to convey to complainant, etc.

The defendants by plea relied upon the statute of frauds as a bar to complainant's claim.

They also answered fully, denying all knowledge, information or belief of the pretended joint purchase of the Indians; denied the pretended joint occupancy and improvement, and the agreement to partition; insisted that said Antoine alone purchased of the Indians, and took possession of the whole premises in question in his own right, and for his own exclusive benefit, about the time mentioned in the bill, and that he continued to occupy the same by himself or his tenants, not only to the year 1807, but to the time of his death in 1829, claiming the whole of the same as his own, and at all times denying the claims of all others. The defendants Disbrow and Clark, in their answers, denied all knowledge or notice of rights in complainant.

Replication was filed to the answer, and the case heard on pleadings and proofs. The evidence is sufficiently stated in the opinion.

 Bernard v. Bougard.

A. D. Frazer, solicitor for complainant.

The case made by the bill is that of a trust, arising by
 133 implication *or construction of law, and is expressly
 excepted from the operation of the statute relied on, by
 the 13th section (*laws of 1819, p. 118*), and may be proved by
 parol, even in opposition to the answer of the defendant denying
 the trust. The statute was never held to apply to such a case.
 (*Wray v. Steele, 2 Ves. & B., 338; Finch v. Finch, 15 Ves., 45;*
Attorney-General v. Fowler, 15 Ves., 90; Jeremy's Equity, 88.)

The complainant's case does not rest nor depend upon the
 promise or arrangement between them, as to the manner of for-
 tifying the title, but rests upon the previous equity of the case.
 The promise alleged is only an additional ground of equity. It
 is the occupation and improvement of the property by the com-
 plainant that constitutes his equitable title, and gives him a right
 to confirmation under the several acts of congress on this subject.
 (*Hutcheon v. Mannington, 1 Ves., 366; Boyd v. McLean, 1 Johns.*
Ch., 582; 2 P. Wms., 548; 1 Johns. Cas., 153; Decouche v.
Savetier, 3 Johns. Ch., 216; Stickland v. Aldridge, 9 Ves., 518;
Livingston v. Livingston, 2 Johns. Ch., 539; Jackson v. Matsdorf,
11 Johns., 96.)

If the deceased did not intend to take the deed as a trust, and
 convey to the complainant, he obtained it in fraud, and, on that
 ground, complainant is entitled to have the trust carried into
 effect, notwithstanding the statute. (*Roberts on Frauds, 102; 1*
Com. Dig., 361, 485; 1 Madd., 239-240, 299.)

It is a clear rule, that where A. purchases in the name of B.,
 the former paying the consideration, B. is a mere trustee, notwith-
 standing the statute of frauds. (*Jeremy's Eq., 85.*) So, if an agent
 locate lands for himself, which he ought to locate for his principal,
 he is in equity a trustee for his principal. It is equally well set-
 tled that all persons coming into possession of trust property, with
 notice of the trust, shall be considered trustees, and bound, with
 respect to that special property, to the execution of the trust.
 (*1 Johns. Ch., 566.*)

Bernard v. Bougard.

H. T. Backus, solicitor for defendants.

*1. The action of the commissioners, both as to the right and the evidence of the right, is conclusive, and especially so since the confirmation by congress. (7 *Wheat.*, 28, 237; *Strother v. Lucas*, 12 *Pet.*, 413.) And this court are in no wise authorized to revise those proceedings, nor by a possibility could such revision be productive of any benefit to the complainant.

2. Had the complainant a valid claim, as against Antoine Bougard or his children, yet the real defendants, Disbrow and Clark, are *bona fide* purchasers without notice, and as such will be protected, and equity can give no assistance against them. (*Frost v. Beekman*, 1 *Johns. Ch.*, 300; 9 *Ves.*, 24.) But had the defendants had full notice of the pretended claim of the complainant, it would in no wise have varied their rights or altered the case, for the claim itself, by complainant's own showing, is a mere nullity, and in the language of Lord Mansfield, had the defendants known of it, they would also have known it was void. (*Wilson v. Mason*, 1 *Cranch*, 70, 100.) As every man is charged with a knowledge of the law. (1 *Johns. Ch.*, 516; *Lyon v. Richmond*, 2 *Johns. Ch.*, 51, 60.)

3. If any such agreement as that contended for by the complainant were in fact made and entered into, yet the same was null and void. 1. As being contrary to the policy of the law, and in fraud of the act of congress, an agreement not only to deceive the commissioners, but to obtain the title to the premises by false pretences and absolute falsehood; and all acts or agreements in *fraudem legis*, or contrary to the policy of the law, are prohibited and void. (*The William King*, 2 *Wheat.*, 148, 153; 4 *Pet.*, 441; 4 *Johns. Ch.*, 254; 2 *Ohio*, 510; 6 *Johns.*, 194; 8 *Johns.*, 444.) But 2. If the complainant's own story be true, he entered into a stipulation and agreement with Antoine Bougard, to commit, or procure to be committed, actual perjury, in the proof of the claim before the commissioners, and he himself aided

Bernard v. Bougard.

in the commission of that positive crime; for as he would now have this court believe, he himself procured witness (so
139 his bill and evidence *state) to swear that the premises in question were the lawful claim of Antoine Bougard, which, by his present case, he seeks to disprove; and the maxim both of equity and law is, *ex turpe contractu non oritur actio*. (1 *Bac. Ab.*, 111; 2 *Binn.*, 101, and cases there referred to; 4 *Ves.*, 811; 8 *Ves.*, 51; 2 *Eq. Ca.*, 20; *Gilbert's Eq. Rep.*, 153.) And 3. To any such agreement as that the complainant now seeks to enforce, the defendant's plea is a conclusive bar, and the same is void by the statute of frauds. (*Stat. 1820, 112, 425.*) It is an express trust, if anything, by parol, and therefore void. It is not an implied trust, or a trust in any way resulting by operation of law; if anything, it is a direct agreement by parol, to create a trust; an attempt to enforce a parol declaration of a trust. The case contains none of the elements of an implied or resulting trust. A resulting trust can only exist where the actual payment of the purchase money is clearly proved. (*Steere v. Steere*, 5 *Johns. Ch.*, 1.) And a payment of a part, or anything less than the whole purchase money, will not raise a resulting trust. (1 *Johns. Ch.*, 582; 2 *Johns. Ch.*, 405; 2 *Mad. Ch.*, 112; 3 *Cow.*, 588; 3 *Ves.*, 696; 1 *Ves.*, 366.)

But to this the complainant insists, that a trust is to be implied, for the purpose of preventing a fraudulent use of the statute of frauds. Trusts for that purpose are never implied, unless some clear and specific act of fraud is distinctly proved, as preventing the execution of a will or other instrument, creating an estate or declaring a trust. (*Roberts on Frauds*, 103; *Thynn v. Thynn*, 1 *Vern.*, 296.) But the facts in this case show no such thing, and if a trust might be implied in the present case, it might in every one, to the entire prostration of the statute.

But the complainant further insists that the facts in the case show the existence and creation of a trust before our statute of frauds. The fact is not so, and it is untenable as a legal position; 1st, because prior to our statute of frauds, the legal estate to the

Bernard v. Bougard.

premises was not in Antoine Bougard; his right was a mere equity under the act of congress, and so was the complainant's, if he had any; no trust, therefore, could, by a possibility, *have existed, for the obvious reason that there was no 140 legal estate to sustain it. But, 2d, if, by a possibility, any could have existed before the legal title vested in Antoine Bougard, yet, not being in writing or declared by writing, even before our statute of frauds, it would have been void; for the rules of property are the same in equity as at law. (*Gilbert's Law of Uses*, 39.) Trusts are now what uses were before the statute of uses. (*Lord Anglesea v. Lord Altham*; *Holt*, 736.) And both uses and trusts have always been governed by the same rules and the same reasons as legal estates. (*Watts v. Ball*, 1 P. Wms., 109.) For were not the rules of property the same in equity as at law, in the language of all the books, things would be at sea, and there would be the greatest uncertainty. (*Banks v. Sutton*, 2 P. Wms., 713; 2 Bl. Com., 337.) Therefore, the rule has ever been, that where a deed or writing was necessary before the statute of frauds, for passing the legal estate, the same formality was necessary to create or declare a use or trust. (*Gilbert's Law of Uses*, 7; 7 Bac. Abr. Tit. *Uses and Trusts*, 92; 3 Atk., 151; 2 Atk., 37.) No legal estate whatever, by the fundamental ordinance, and laws both of the Northwest Territory and the Territory of Michigan, could, at any time, be created or transferred by parol. (*Fundamental Ord.*, Art. 1; *Lindsey v. Coats*, 1 Ohio Rep., 113.) For these reasons, then, any pretended trust prior to the statute of frauds, would be a nullity.

THE CHANCELLOR.—Every material allegation in the bill is fully and positively denied by the answer. The defendants, nine in number, say the complainant never either owned or occupied the said land, or any part or portion thereof; but the children and heirs, on the contrary, say, from their earliest recollection, their father held the entire, exclusive and peaceable possession of the whole tract, as well the pretended eastern as the western por-

Bernard v. Bougard.

tion; that the said Antoine did not, immediately before
141 his death, or at any time, direct them to convey *any
portion of the tract to the complainant, or admit that he
had any interest therein.

Indeed, it is hardly possible that an answer could be made
more full and complete to all the material allegations in the bill.
The defendants also set up and insist upon the statute of frauds.

Voluminous testimony has been taken on both sides.

The testimony has been carefully considered, and I cannot,
from a review of it, come to the conclusion that the claim of the
complainant can be sustained.

The complainant relies for the establishment of his claim upon
the testimony of Joseph Beauxhomme, Louis Bernard, Louis
Morminee, Joseph Drouillard and Louis Louigne.

The testimony of Beauxhomme is as to admissions made by
Bougard, and is inconsistent with itself. He makes Bougard
admit that the complainant is entitled to one-half, and says still
that he said the two acres troubled him, etc.; and it is entirely at
variance with the allegations of the bill, that the land was divided
and complainant in the possession of the east half. But little
weight can be attached to the testimony of Louis Bernard. It is
in proof that he had previously alleged that the present com-
plainant had no interest in the land in question, but that it
belonged to him. Louis Morminee testified before the board of
land commissioners that it belonged to Bougard. Drouillard tes-
tifies as to the original purchase from the Indians; and says it
belonged to both complainant and Bougard. Louis Louigne sub-
stantially sustains the last witness, but is manifestly mistaken as
to other statements which he makes, and so much so as at least to
cast some doubt upon his testimony. There is such discrepancy
and so much uncertainty in the showing in this case, that the
testimony of the witnesses as to transactions of so ancient a date
should be received with caution.

The testimony of Margaret Rivor and Narcissa Delisle, who
have resided near the land for a long time, strongly sustains the

Bernard v. Bougard.

answers; they resided near the lands at a very early period, and never saw the complainant at work on the land, or *heard of his claim. Indeed, the proof of any actual 142 occupation by complainant, aside from the admission testified to by Beauxhomme, is very slight. When it is considered that the fact of a separate and distinct possession and occupation of the east half of the tract of land as alleged in the bill for so long a time, and up to a period so recent, must, if true, have been so notorious as to have been capable of clear and positive proof, coupled with the testimony as to the claim of Louis Bernard that the land belonged to him; and also the testimony of Durocher, that so late as 1821 the complainant claimed the whole of the land, it is difficult to come to the conclusion, from anything here presented, that the claimant ever had such a possession and occupation of any portion of this land, either joint or several, as would have entitled him to a confirmation by the commissioners, under the act of congress of May, 1820, continuing in force the previous act of 1807. The claim of the complainant is probably founded on family residence; he was, no doubt, occasionally there when a boy. It is true, there is great discrepancy in the testimony.

But after a confirmation and patent, if it is competent at all to go behind it, it should only be done upon the clearest and most irrefragable proof.

The point insisted upon in the argument, that the agreement, or pretended agreement, that both complainant and Bougard would concur in making proof before the commissioners of that which, according to the allegations in the bill, did not exist, to wit: the sole occupation and improvement of this property by Bougard, so as to bring him within the requirements of the act of congress, is immoral, is entitled to weight. The commissioners had no authority to confirm to any except to those who proved themselves to come within the provisions of the act of congress. They have never acted upon any claim or right of this complainant.

If the allegations in the bill are true, the commissioners have

Bernard v. Bougard.

been led by false lights to do an act which they were not authorized to do. And if this conspiracy had not existed, it is possible such facts might have been elicited as would have
143 *satisfied them that of right it should have been confirmed to neither the one or the other.

The ground taken by the complainant, in order to avoid the statute of frauds, is, that this is a resulting trust; that the complainant, being actually entitled to the east half, and the title having been vested in Bougard, the complainant may compel the heirs to execute the trust.

From the premises it will be perceived that, in the view of the court, this position cannot be sustained.

First. It is not sustained by such clear and undoubted proof as should be required in a case like the present, that the complainant was ever entitled to a confirmation of any portion of this trust.

Indeed, from all the facts and circumstances developed in the case, I am inclined to think otherwise.

Second. If it were apparent that the complainant would have been entitled to a confirmation, it would still be questionable whether it would come within the rule of an implied or resulting trust.

A resulting trust only exists where the actual payment of the purchase money is clearly and distinctly proved. Payment of a part, or anything less than the whole, will not raise a resulting trust. (*Steere v. Steere*, 5 Johns. Ch., 1; *Boyd v. McLean*, 1 Johns. Ch., 582.)

This was not a purchase. The occupants of these lands could not claim the grant of the government as a matter of strict legal right, although they may have had strong equitable claims. It was rather in the nature of a bounty or gift by the government.

If there was any trust, it was an express trust, and by parol, not evidenced, or pretended so to be, either as to its existence or terms, by any written contract or memorandum whatever, and, to this, the plea of the statute of frauds, as has already been decided in this court, is a conclusive bar.

Bernard v. Bougard.

The existence of a trust may be shown by parol, but there must be some memorandum in writing showing its terms.

From the view I have taken of the case, all that portion of *the proceedings and proofs which relates to the 144 purchase by Clark and Disbrow with notice, as is alleged, becomes immaterial. If they had notice of the claim of the complainant, it was a notice that he had no valid claim. The bill must be dismissed with costs.

Bill dismissed.

Tate v. Whitney.

Benjamin Tate v. Jacob Whitney.

Consideration: Duress. Where the fears of a timid and ignorant man were practiced upon by threats of a prosecution for slander, and he was thereby induced to assign a mortgage to another, the assignment was held to be without consideration, and a re-assignment was decreed. (α.)

This bill in this case was filed August 17, 1837, and states that on or about the second day of June of the same year, the complainant possessed a certain indenture of mortgage, executed by William Gilcrist to complainant, bearing date April 8, 1837, of certain premises therein described, conditioned to pay five hundred dollars, and interest, six months from the date thereof.

That, on or about the second day of June, 1837, complainant had a conversation with defendant at Jonesville, in the county of Hillsdale, in regard to the subscription, by the complainant, for a certain newspaper called the Christian Palladium, in which conversation complainant told the defendant that he never had subscribed for said paper, nor authorized any other person to subscribe for said paper for him (the complainant); and that complainant further stated to the defendant that he, the defendant, had forged his (the complainant's) name, or given some other person liberty to sign the complainant's name for said paper,

(α) The compromise and settlement of a claim asserted in good faith is a sufficient consideration for the settlement, and for any obligations given by one party to the other in consummation of it. *Van Dyke v. Davis*, 2 Mich., 144; *Weed v. Terry*, Wal. Ch., 501; 8 C., 2 Doug. Mich., 344; *Hale v. Holmes*, 8 Mich., 37. In *Gates v. Shutts*, 7 Mich., 127, it appeared that defendant had charged complainant with intentionally burning his own mill, and made claim for payment for certain wheat of the defendant which had been placed in the mill before it was burned; that complainant gave his note and mortgage for the value of the wheat, but afterwards filed a bill to set aside these securities as obtained through threats, fear and duress. Held, that the securities must stand if there was no fraud, and no undue advantage taken by defendant to bring it about, and he had reason to believe the charge, and did not manufacture it to frighten complainant into a settlement. Upon this general subject see 1 Story Eq. Juris., § 131, *et seq*; *Adams' Eq*, 183, and cases cited in 4th Am. ed.

Tate v. Whitney.

which the defendant denied. That, soon after such conversation, the defendant threatened to prosecute the complainant for the words he had spoken as aforesaid, and told complainant if he did not assign over to the defendant said mortgage, and the bond referred to therein and accompanying the same, as a collateral security, and settle with him, the defendant, for the language complainant had used in relation to the subscription for said newspaper, he, the defendant, *would keep the com- 146
plainant in prison eight or ten years, for what he, the complainant, had said; and complainant being intimidated and greatly distressed at the threats and menaces of the defendant, and being ignorant of his own rights, and of the law, was induced, by these threats and menaces of the defendant, to execute an assignment of the bond and mortgage, and did, on the second day of June aforesaid, execute and deliver to the said defendant an assignment of said bond and mortgage, without any consideration of whatever name or nature, and did actually deliver over said bond and mortgage. The bill further alleges that the complainant had applied to the defendant to re-assign and re-deliver said bond and mortgage, and to pay complainant the amount thereof, etc., which defendant had refused to do; and prays that the defendant may be decreed to pay to the complainant whatever money, if any, he may have received, or shall receive, on said bond and mortgage, and be restrained by injunction from assigning or in any way transferring or disposing of the same, and that defendant may be decreed to re-assign and deliver up said bond and mortgage to complainant.

The answer admits the bond and mortgage, and that at the time of the assignment thereof there was then due thereon about the sum of three hundred and thirty-five dollars; states that previous to the time of the assignment stated in the bill the defendant had been frequently informed by divers good and worthy citizens of the county of Hillsdale that the complainant had reported and declared, and was in the frequent habit of reporting and declaring, that the defendant had *forged* the name of the com-

Tate v. Whitney.

plainant to a subscription for the newspaper mentioned in the bill; that defendant was advised to ask some redress of the complainant for his slanders; that the defendant called on the complainant, and had a conversation with him, in which the defendant informed the complainant of the slanderous, false and defamatory declarations made by the complainant, of and
147 concerning the defendant, charging *him with the crime of forgery; that the complainant admitted to defendant that he had before then, at divers times and places, and in the hearing and presence of divers persons, reported and declared that the defendant had *forged* his (the complainant's) name to the said subscription, and that the reports and declarations were false, and without any foundation in truth, and that the complainant was willing to redress the wrong he had done to the reputation and good name and credit of the defendant by such false and slanderous reports; to which the defendant replied that the said complainant must make him (the defendant) satisfaction in some way, or that the defendant should seek redress by proceedings at law; that complainant then informed defendant that if he (the defendant) would take the bond and mortgage in full satisfaction for the wrongs done him by the false and slanderous reports and declarations of the complainant, he (the complainant) would duly assign over the same to the defendant; and that complainant strongly solicited the defendant to accept of the mortgage in satisfaction for the said wrong; that at the special request and urgent solicitation of the complainant, the defendant agreed to accept and receive the bond and mortgage in full satisfaction of said wrong and injury, and thereupon the complainant assigned and delivered the said bond and mortgage to defendant, and defendant at the same time acquitted and discharged complainant from all liability for his false and slanderous reports, etc. The answer denies the threats of prosecution, etc., and also denies that defendant told complainant he would keep him in jail, as stated in the bill.

The cause was heard upon bill, answer and proofs.

Tate v. Whitney.

E. Lawrence, for complainant.

* *P. R. Adams*, for defendant.

149

THE CHANCELLOR.—From the bill, answer and testimony, it is apparent that the defendant was practicing upon the fears of a timid and ignorant man, and that the assignment of the mortgage in question was in fact procured without any consideration whatever. The complainant is entitled to a decree that the defendant, Whitney, re-assign and re-deliver said mortgage to the complainant within thirty days from the service of a copy of the decree in this cause.

Decree accordingly.*

* An appeal was taken in this case to the supreme court, and the decree of the chancellor affirmed January 22, 1839.

 Thompson v. Mack.

 arrington.
 1h160
 117 629

Thompson v. Mack and others.

Recording laws: Priority as between grantees. Where a party claims priority under or by virtue of the statute regulating the registry of deeds and mortgages, he must show a compliance with its provisions in order to entitle him to such priority.

Mortgage by deed absolute in form, record of. Under the code of 1833, where a deed absolute in form was shown by contemporaneous writing to be only a mortgage, it should have been recorded as a mortgage; and if recorded as a deed, the record would not give it priority over a prior unrecorded mortgage. (a.)

Once a mortgage always a mortgage. Where a deed absolute in form was given to secure a debt, and the grantee at the time gave back an agreement to reconvey when the debt should be paid, but this agreement was not recorded, and the deed was recorded as a deed and not—as the statute required—as a mortgage; and the grantor, to obtain further credit, afterwards gave up the agreement to reconvey, and the grantee sold the land: *Held*, that the deed having originally been a mortgage did not cease to be such on the surrender of the agreement, and that the deed not having been properly recorded, the subsequent grantees could not claim priority over a mortgage duly recorded which the first grantor had given after conveying as above stated. (b.)

This was a bill to foreclose a mortgage, and stated that the complainant, August 11, 1830, purchased a quantity of drugs and medicines to the amount of \$197.23 of the firm of Lawrence, Keese & Co., of the city of New York. That afterwards, and before the goods were received, it was agreed between the complainant and Mack that the latter should take the drugs and medicines and pay for them; and that Mack, on the 14th April, 1831, gave

(a.) See the statute under which this decision was made in the chancellor's opinion. The provisions of the revised statutes of 1846, which are now the law on this subject, are considerably different, and the question may perhaps at some time arise whether this decision is applicable to them. The New York cases, cited in the opinion, were based upon peculiar provisions of statute.

(b.) The chancellor appears to hold that this would be the law notwithstanding the subsequent grantees bought in good faith, and without notice of the defeasible character of the first deed. Indeed, he says that "If in fact the transactions between Mack [the first grantor and mortgagor] and Chamberlain [the grantee in the first deed] constituted the instrument a mortgage and no more, the record of the mortgage of Thompson should be regarded as a sufficient notice to a subsequent purchaser." This would be to make the protection of the registry laws to a subsequent

Thompson v. Mack.

a mortgage to the complainant on lot number fifty-seven, in the village of Pontiac, to indemnify him against the payment of the debt due to Lawrence, Keese & Co., which mortgage was afterwards recorded, July 24, 1833; that Mack had neglected to pay Lawrence, Keese & Co., who had sued the complainant for the price of the drugs and medicines, and recovered a judgment against him of \$265.47 damages, and \$8 costs, which the complainant had paid; that April 9, 1833, Mack conveyed, by an absolute deed, the lot mortgaged (together with another lot in Pontiac) to the defendant Chamberlain, whose deed was recorded July 20, 1833, four days previous to defendant's mortgage. The bill charged that the deed from Mack to Chamberlain, although absolute *on its face, was intended by the par- 151 ties to operate as a mortgage only, and was given to secure a debt due from Mack to Chamberlain; that Chamberlain had bound himself by bond, or other writing, to re-convey the premises on the payment of the debt, and that such bond or writing for a re-conveyance was not recorded by Chamberlain with his deed; it further states that June 29, 1834, Chamberlain conveyed the lot to the defendant Keeney, who, June 3, 1834, conveyed it to the defendants Draper and Richardson; and Chamberlain, Keeney, Richardson and Draper, were severally charged with notice of complainant's mortgage at the time of their respective purchases.

The defendants put in several answers. Mack, in his answer, admits the purchase of the drugs, etc., but not till after they had been received by Thompson, and put into Mack's store for sale;

purchaser depend upon matters of fact not brought home to his knowledge; and this case would then be an exception to the general rule, that one who, in searching the records, finds a deed apparently conveying all the grantor's interest, is not bound to search for conveyances by the same grantor afterwards recorded, but of which he has no actual notice. The statutes of 1846 (Comp. Laws, § 2761) render a *defeasance* not recorded of no effect except as against the maker thereof, his heirs or devisees, and persons having actual notice thereof.

For illustrations of the maxim "once a mortgage always a mortgage," see *Comstock v. Howard*, Wal. Ch., 110; *Thurston v. Prentiss*, 1 Mich., 193; *Batty v. Snook*, 5 Mich., 231.

Thompson v. Mack.

states that Thompson put a clerk in the store to sell the goods; that the clerk sold a considerable portion of them, and used part of the money, the proceeds of the sales, for his private purposes; that Mack aided in selling the goods, etc.; that April 14, 1831, Mack purchased of Thompson the drugs unsold, and the debts due for those which had been sold, and agreed to indemnify Thompson against the debts due by him to Lawrence, Keese & Co., and to pay the \$32 for transportation, and that Mack and wife, on the same day, executed the mortgage mentioned in the bill, as indemnity to Thompson; that the mortgage was not recorded until the time stated in the bill; that, December 10, 1832, he paid to Thompson \$56.98, to be applied on the mortgage, and took receipt to that effect; that Thompson is also indebted to him in the sum of \$91 for services, and also owes him for rent, and on other accounts, as he believes, to the amount of the debt; denies any knowledge of the judgment against Thompson; admits the deed to Chamberlain, of April 9, 1833, and its record, and that he took from Chamberlain a paper, not under seal, in which Chamberlain agreed to re-convey the lots, if he should in a short time (could not state how long) pay to Chamberlain the amount due him, which was about \$150; that he, Mack, being

152 *in embarrassed circumstances, shortly afterwards applied to Chamberlain for further credit, and to obtain such credit he gave up the agreement to re-convey, and surrendered all right, title, claim and equity of redemption in the premises; that he did not tell Chamberlain of Thompson's mortgage, and does not believe that Chamberlain knew of that mortgage; that the reason that two lots were deeded to Chamberlain was that there was an incumbrance of dower on one of them; that Keeney bought the lots fifty-seven and fifty-two of Chamberlain; that he never informed Keeney, and does not believe he knew of Thompson's mortgage at the time he purchased the lots; that the sale to Keeney was not for the benefit of Mack or his family.

Chamberlain, in his answer, admits that Mack was indebted to him, and gave him a deed of lots numbers 57 and 52, April 9,

Thompson v. Mack.

1833; denies that he had any notice of Mack's mortgage to Thompson. Further states that when Mack gave up the written agreement he released and surrendered all right to redeem; that he paid Mack the full value of the premises, encumbered as they were by a claim of dower. That Keeney paid the full value for the lots; that at the time of making the deed to Keeney, he, Keeney, had no notice of Thompson's mortgage, to his knowledge. Keeney, in his answer, denies any knowledge of Thompson's mortgage at the time he purchased from Chamberlain, and until he had sold to Draper and Richardson; admits the deed from Mack to Chamberlain, of April 9, 1833, and deed from Chamberlain and wife to him, June 26, 1834. Denies all knowledge of any agreement other than the deed from Mack to Chamberlain, until after he sold to Draper and Richardson; that he cannot state the exact amount paid by him for the lots; that he gave full value, and purchased them for himself, etc. Admits the sale by him to Draper and Richardson, June 3, 1835, and their mortgage, etc., to him.

Draper and Richardson, in their answer, admit that they had notice of Thompson's mortgage, either before or after their purchase, but do not remember which.

* *R. Manning*, for complainant.

153

The deed from Mack to Chamberlain, although absolute on its face, is nevertheless a mortgage. It was given to secure a debt to Chamberlain, who was to re-convey the premises when Mack paid him.

As a mortgage, the defeasance, or agreement to re-convey, should have been recorded with the deed, in the record of mortgages, as the statute requires. (*Rev. Laws of 1833, pages 283 and 284, § 3.*) By the registry of it as a deed, instead of a mortgage, it did not, as a mortgage, gain priority over the complainant's mortgage. (*Dey v. Dunham, 2 Johns. Ch., 182; Grimstone v. Carter, 3 Paige, 421; James v. Morey, 2 Cowen, 246.*) The reg-

Thompson v. Mack.

istry of it, as a deed, availed nothing. The registry of a legal instrument does not change the nature or effect of the instrument. It does not change a mortgage into a deed, or a deed into a mortgage. Its only effect is to give priority to legal instruments which have been properly recorded. Whether, therefore, the defeasance was delivered up to Chamberlain before or after the complainant's mortgage was recorded, if after the deed had been recorded, cannot alter the case, for it could not make a good record out of what was before a bad record, or no record at all. From the testimony of Chamberlain it appears the surrender of the defeasance was not intended to turn the mortgage into an absolute deed. He considered the deed afterwards, as he had done before, as security for the debt Mack owed him. The complainant's mortgage was recorded long before Keeney purchased of Chamberlain, and as Chamberlain's deed is not good, either as a deed or mortgage, against the complainant's mortgage, Keeney's deed certainly cannot be. If there was any doubt that Chamberlain's deed continued to be a mortgage after the defeasance was surrendered, and it should be insisted the defeasance was given up to Chamberlain before the deed was recorded, the testimony is too vague and uncertain upon that point to take away the common law rights of the complainant. The defendants, when seeking to gain

154 an advantage through the registry *law, should clearly show themselves entitled to it by a compliance with the law.

B. F. H. Witherell, for the defendant.

Chamberlain was a purchaser without notice. (See 2 *Ves.*, 453; 3 *Ves.*, 221; 4 *Ves.*, 383; 9 *Ves.*, 24.)

Chamberlain took up the *writing* of defeasance *before* his deed from Mack was recorded; when that instrument was taken up, if not before, his deed from Mack became *absolute*.

By the *writing* or *article* to Mack from Chamberlain, Mack was to have but sixty days to redeem; the deed was then absolute.

Keeney was a purchaser for a *bona fide* consideration, without

Thompson v. Mack.

notice, and if Chamberlain had notice Keeney will be protected. (*Demarest v. Wyncoop*, 3 Johns. Ch., 129; *Jackson v. Given*, 8 Johns., 141; *Laws 1833*, p. 283, sec. 2, p. 279, sec., 2.)

Draper and Richardson are protected as well as Keeney, under the principle that a purchaser *with notice* to himself from one who purchased *without notice* may protect himself under the first purchaser. (*Bumpus v. Platner*, 1 Johns. Ch., 213.)

THE CHANCELLOR.—From the facts stated in the bill, answer and testimony, there can be no doubt that the conveyance from Mack to Chamberlain was a mortgage, and a mortgage only, in its inception; and it is evident that it so continued, and was so regarded until the transactions were closed by the payment of the amount due to Chamberlain, and the conveyance to Keeney.

It is admitted to have been so in the first instance.

Chamberlain, in his testimony, says that the instrument of defeasance was given up, so that the estate conveyed should remain as security for further advances.

The account with Mack was not closed at that time.

Chamberlain says he should, at any time, have re-conveyed to Mack upon payment of the amount due, and an allowance for his trouble in securing his debt.

*He did actually convey the premises to Keeney, the 155 father-in-law of Mack, upon payment of the advances made by him, and the charges for his trouble.

The statute (*Laws of 1833*, page 284, section 3) provides that "every deed conveying real estate, which by any other instrument or writing, shall appear to have been intended as security, in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage and be deemed and adjudged to be liable to be registered as other mortgages are by virtue of this act; and the person or persons for whose benefit such deed shall be made, shall not have the advantage given by this act to mortgages, unless every instrument and writing operating as a defeasance of the same, or explanatory of its being

Thompson v. Mack.

designed to have the effect only of a mortgage or conditional deed, be also herewith registered in substance as in case of mortgages."

The deed of Chamberlain with the writing or agreement to Mack ought to have been registered as a mortgage. The recording of that deed, as a *deed*, though the record was prior to that of Thompson's mortgage, can give it no priority over that mortgage. (See *Dey v. Dunham*, 2 Johns. Ch., 182; *Grimstone v. Carter*, 3 Paige, 421.)

Four days after the record of the deed from Mack to Chamberlain, Thompson recorded his mortgage and thus gave notice of its existence.

Keeney claims, however, to have been a purchaser without notice.

But if in fact the transactions between Mack and Chamberlain constituted the instrument a mortgage and no more, the record of the mortgage of Thompson should be regarded as a sufficient notice to a subsequent purchaser.

The fact of a subsequent sale, especially while the mortgage of Thompson was standing upon the record, would not change the character of the transaction between Mack and Chamberlain. It would defeat the salutary provisions of the statute to permit it to be evaded by a sale to another when the party claiming (as in this case Thompson had done) had placed his mortgage upon record.

156 *The mortgage to Thompson being of prior date, without reference to the registry laws would have priority; the defendants claim priority by virtue of the provisions of the statute. In order to entitle themselves to such priority, they must conform to its terms, which has not been done.

Mack sets out in his answer that the mortgage is nearly or quite paid. This will render it necessary that it be referred to a master to examine and report the amount due upon the mortgage, after allowing all proper credits and offsets, and to report to this court with convenient speed; and further directions are reserved until the coming in of the master's report.

Lapeer County v. Hart.

**The County Commissioners of Lapeer County v. Alvin N. Hart
and others.**

Bills of peace. Bills of peace are only allowed where the complainant has established his right at law; or where the persons who controvert the right are so numerous as to render an issue under the direction of this court indispensable to embrace all the parties concerned, and save a multiplicity of suits.

Where sixty-seven suits were brought upon county orders by different plaintiffs before justices of the peace, some of which were tried and judgments rendered for the plaintiffs, and five of them appealed to the circuit court, and the county commissioners claimed to have a valid defense to them all, and filed a bill in equity to enjoin them until the appealed suits could be tried, it was held that no case of equitable jurisdiction was made out, and a preliminary injunction was dissolved.

The fact that there were no funds in the county treasury with which to pay the costs and appeal the remaining suits constitutes no reason for equitable interference. (a.)

The bill in this case was filed May 23, 1839, and stated that November 16th, 1838, the board of supervisors of the county of Lapeer, assuming to act in the performance of the duties imposed on the county commissioners by the revised statutes, after the county commissioners had been declared duly elected, but before they had qualified, proceeded to enter into a contract with one Norman Davison, by which the supervisors pretended to bind the county to pay Davison twelve hundred dollars to complete a court house (the frame of which was up) for the county, and directed the issuing of county orders on the treasurer of the county for six hundred dollars, which were issued and delivered to Davison as a part payment; that the orders were issued in small sums, from one dollar to one hundred dollars each, which orders were required to be paid by the county treasurer out of any moneys in the county treasury not otherwise appropriated; were made receivable in payment of county taxes, and payable Jan-

(a.) As to bills of peace generally, see Mitf. Eq. Pl., by Jeremy, 146; 1 Mad. Ch. Pr., 140; 2 Eden on Inj., by Waterman, 417; Adams' Eq., 199; Story Eq. Juris., §§ 862-880.

Lapeer County v. Hart.

uary 1, 1839, to Norman Davison or bearer. That, at their first meeting after being duly qualified, viz., the first Monday of January, 1839, the county commissioners, deeming the proceeding of the board of supervisors illegal and unauthorized by law, passed a resolution to that effect, and immediately gave notice to the collectors of the several towns in said county, and to the treasurer thereof, not to receive the said orders in payment of taxes. That, when the orders became due and payable, payment was demanded

of the treasurer by the several holders, which payment
158 *was refused, as well for the reason that the county commissioners had forbidden their payment, as for the reason that there was no money in the treasury not otherwise appropriated. That the holders of the orders commenced a series of vexatious suits against the county commissioners on the orders, before justices of the peace; that sixty-seven suits were brought in one day, process in each returnable on the same day, before three different justices, keeping their offices and doing business at distances of from five to twelve miles from each other, for the purpose of subjecting the county commissioners to great inconvenience, and deprive them of making their defense. That judgments had been rendered against the commissioners in forty-four of the suits so commenced, and the other twenty-three were still pending and undecided. The bill further stated that the whole amount of judgments recovered amounted to about five hundred dollars, and that the holders unnecessarily and vexatiously multiplied suits; that appeals had been taken in five of the cases, for the purpose of testing the legality of the proceedings of the board of supervisors, and the principle involved in all the suits was the same; that the commissioners were unable to take appeals in all the cases, in consequence of there being no funds in the treasury to pay the costs; that the costs which were required to be paid, to enable them to take appeals from the several judgments, would fall but little short of the whole amount of the judgments. The bill charged that the holders of the orders conspired to commit a fraud, and extort money from the county, etc., and prayed for

an injunction to stay proceedings at law upon the suits already commenced, and to restrain the holders of the orders from commencing other suits at law, until the suits appealed should be determined. An injunction was granted according to the prayer, and this was a motion to dissolve the injunction for want of equity in the bill.

D. Goodwin, in support of the motion.

*1. The court has no jurisdiction. This is wholly at 159 law, and the courts of law can try the whole matter.

2. The complainants themselves show that in forty-four cases tried, judgment was for the plaintiffs, and not against them. The cases where courts of equity interfere are usually those where, in trials at law, the complainant has sustained a title, or right, and there are subsequent repeated actions to question that title or right.

3. Here *the right claimed is on the part of the several defendants in the bill* who held the orders, and is resisted by the complainants. The complainants are not seeking to enforce a right which is invaded, but to resist a right claimed, and by their own showing established by forty-four judgments.

4. It does not appear from the bill that the defenses in the several cases were one and the same. They might have been different in each case. The bill does not show or allege what the pleas were in any of the cases; in some it seems the pleas were to the jurisdiction of the court.

5. When chancery interferes to prevent a multiplicity of suits, it is in cases where *the subject of the suits is the same*, and not different. Here the suits, according to the bill, are upon separate orders, and these not in the hands of the original holders, but transferred and held by different individuals, and where the holders may hold for a valuable consideration, and without notice. (*1 Maddox*, 166; *2 Johns. Ch.*, 281; *3 Johns. Rep.*, 601.)

6. In forty-four cases there were judgments rendered, and in five of these only there were appeals. In the rest, the judgments

Lapeer County v. Hart.

are absolute, and this court can never restrain their collection; the defense, if any, now being purely at law, and the judgments having become absolute. In the five, the judgments are suspended by the appeals, and it does not appear that the questions therein are the same; and in the remainder the pleas are to the jurisdiction, and this court is not apprised what are the questions that are to be tried, and cannot, therefore, interfere.

7. The cases where the court interferes, are when it can
160 *order a single issue to be tried, and one that shall decide the whole; and where an injunction can thereupon be granted and made perpetual upon the parties, the single right being decided. Here this is impossible.

A. S. Porter and A. D. Frazer, contra.

THE CHANCELLOR.—I am satisfied this case does not come within the principles of any of the cases cited in support of the injunction.

Bills of peace are only allowed where the complainant has satisfactorily established his right at law; or where the persons who controvert the right are so numerous as to render an issue under the direction of this court indispensable, to embrace all the parties concerned, and save a multiplicity of suits. (*Fonb. Eq.*, 28; *Eldridge v. Hill*, 2 *Johns. Ch.*, 281.)

It is not pretended in this case that the right in litigation has been established in favor of the complainants; on the contrary, all the cases which have been tried have been determined in favor of the defendants in this cause.

It is not indispensable that this court should interfere in the present case (on account of the great number of persons who controvert the right) and direct an issue under the control of this court. The parties who have brought suits on the orders are all regularly in the courts of law, and each claims in his own right; nor is it pretended that the defense cannot properly be made at law. The complainants do not even ask this court to interfere and direct an issue, but concede that their defense is at law.

It is urged that more suits are brought than were necessary to determine the right to recover. In the case of *Peters v. Prevost*, *Paine's U. S. Circuit Court Rep.*, 64, an application was made for an injunction to stay proceedings in ninety-two suits in ejectment (where the parties pleading title and the testimony were the same in each suit) until one or more could be tried, and the remainder to abide the event, and the injunction was refused. If the suits in the present case were wrongly *brought, the 161 defendants below will recover their costs on appeal; and while the statute does not inhibit the bringing of suits in the manner in which these suits were brought, and gives the right of appeal, it would be stepping beyond all precedent for this court to stay proceedings by injunction, on the ground of multiplicity of suits.

The fact that there were not sufficient funds in the treasury to pay the costs of appeal can hardly be seriously urged as a reason for the interference of this court.

That the holders of these orders are unnecessarily harassing the complainants does not sufficiently appear; the suits were all brought on the same day, before three different justices, and the complainants appeared and defended. If suits had been brought singly, from day to day, this allegation might have been urged with more force.

I had doubts of the propriety of granting the injunction in this case, and in any view I can take of the question I am now satisfied that it cannot be sustained.

The parties were all properly in the courts below, and are now there, and it cannot be indispensable for this court to interfere, to bring all the parties into one suit. Indeed, the rights of each, for aught that appears, stand on grounds different from the others.

If the defendants did not take appeals, for want of funds, it is one of those misfortunes against which this court cannot relieve.

It is admitted that the defense is at law, and the parties must there make it.

Injunction dissolved.

Eldred v. Camp.

Daniel B. Eldred and another v. Camp and Shumway.

Injunction, dissolution of, where equity denied. Where the equity of a bill is denied by answer, the injunction will be dissolved on motion (a.); and so it will be if it is shown by special plea that there is no equity in the bill.

Return of execution: Creditor's bill. For the purposes of a creditor's bill an execution returned by the sheriff that he had "property on his hands for want of bidders," is insufficient. (b.)

Motion to dissolve an injunction.

This was a creditors' bill in the usual form, setting forth that the complainant, Daniel B. Eldred, recovered against the defendant Camp, and one Boville Shumway, two judgments in the circuit court for the county of Calhoun, and that executions had been duly issued on said judgments, delivered to the sheriff, and returned unsatisfied; that the sum of \$621.28, with interest from November 10, 1838, over and above all just claims by way of set-off, or otherwise, was, at the time of filing the bill, due to the complainant, Daniel B. Eldred, on the judgments.

An injunction was granted.

The defendant Camp put in a special plea to the bill, in which he admits the recovery of the judgments, the issuing of the executions, the delivery of the same to the sheriff, and the amount due as stated in the bill, and then proceeds: "Yet this defendant

(a.) The answer, however, must be full and satisfactory, and even then the court may refuse to dissolve if the effect might be to deprive the complainant of all benefits he might derive from succeeding in the suit. *Attorney-General v. Oakland County Bank*, Wal. Ch., 90. An injunction will not be dissolved on an answer admitting the equity of the bill, and setting up new matter as a defense. *Ibid.* Affidavits will not, as a general rule, be allowed to be substituted for an answer for the purposes of this motion, though there may be exceptions. *Sacket v. Hill*, 2 Mich., 182.

(b.) The return of an execution unsatisfied, for the purposes of a creditor's bill, cannot be made before the return day. *Smith v. Thompson*, Wal. Ch., 1; *Beach v. White*, Wal. Ch., 495; *Williams v. Hubbard*, 1 Mich., 446; *Thayer v. Swift*, *post*, 430. A return unsatisfied by order of the plaintiff is insufficient. *Williams v. Hubbard*, Wal. Ch., 28.

Eldred v. Camp.

severally pleads in bar to the said complainants' said bill of complaint, and says, that after the issuing of the two executions above mentioned and described, on the said two judgments above mentioned, with the commands, indorsements, and directions above set forth, and the delivery of the same to the said sheriff of the county of Calhoun, in the lifetime of the said two executions, and before the return day thereof, to wit, on or about the 30th day of August, 1839, the said sheriff of the said county of Calhoun, to wit, Loren Maynard, by his deputy, Solomon Platner, by virtue of said executions, and the said indorsements so made thereon, as aforesaid, levied upon and seized a large quantity of real estate as the property of this defendant and the said Boville Shumway, the defendants in the said executions, which said property is described *as follows (describing the land); and this 163 defendant further severally says, that after such levy and seizure of the aforesaid described lands and real estate, by the said sheriff, by virtue of said two executions, to wit, on the said 30th day of August, in the year last aforesaid, he, the said sheriff, by his deputy above named, caused a notice of the sale of said lands and real estate to be published in a newspaper called the Calhoun County Patriot, to take place on Friday, the first day of November then next, at the court house in the village of Marshall, at one o'clock in the afternoon of that day; and that afterwards, and on the sixth day of November, 1839, the said sheriff of the said county of Calhoun, by his said deputy, above named, returned the said two executions to the clerk of the said circuit court, out of which court the same were issued, with a return indorsed upon each thereof, and signed by the said deputy sheriff, that he returned said executions 'property on his hands for the want of bidders,' which executions were each of them then and there filed by the said clerk, and the aforesaid return of the said sheriff, entered by the said clerk in the book of records kept by him, the said clerk, for that purpose, pursuant to the provisions of the statute in such case made and provided. And this defendant further says, that the above mentioned and described executions

Eldred v. Camp.

are the only executions that have been issued upon the said two judgments, and that if any such return as is specified in said complainants' said bill of complaint was ever made on said two executions, or on either of them, by the said sheriff of the said county of Calhoun, or his said deputy, the same was falsely and fraudulently made, by the aid, advice or procurement of said complainants, or their solicitor or attorneys, after the said executions had been so returned by the said deputy sheriff, with such return thereof indorsed thereon and signed by him, as above specified, and after said executions had been so filed by the said clerk, and the return thereof so entered in the said book of records, as aforesaid, without the knowledge or consent of this defendant, or the said Boville Shumway, and without any leave for that purpose obtained from the said Calhoun county circuit

164 *court. All of which matters and things this defendant does aver and plead to the said complainants' said bill of complaint, and humbly craves whether he shall make any other or further answer to the said bill of complaint."

This plea is verified by the oath of the defendant pleading the same.

The defendants, upon filing the plea, moved to dissolve the injunction. The motion came on for hearing at the January term, in the third circuit.

Lee and Pratt, in support of the motion.

Sandford and Bradley, contra.

THE CHANCELLOR.—Where the equity of the bill is denied, the injunction, on motion, will be dissolved; and where it is shown by a special plea that there is no equity in the bill, it is the same, so far as regards the motion to dissolve, as though the equity of the bill were fully denied by answer.

A creditor's bill proceeds upon the ground that the complainant has exhausted his remedy at law, and the regular return of the execution unsatisfied, by the proper officer, is evidence of that

Eldred v. Camp.

fact. Here, it appears from the plea that the executions were not returned unsatisfied, and the facts set up in the plea are not denied. This defeats the equity of the bill, and the injunction must be dissolved.

Injunction dissolved.

Livingston v. Jones.

Henry B. Livingston and another v. Enoch Jones and another.

Acknowledgment no part of deed. The acknowledgment of an assignment of mortgage is no part of the instrument of assignment. (a.)

1h 100
67 614

Foreclosure bill: Allegation of assignment of mortgage. The averment in a foreclosure bill that the owner of a bond and mortgage, in consideration of one dollar, assigned the same to the complainants, and that on the same day the assignment was duly acknowledged before a commissioner of deeds according to the laws of the State of New York where the same was executed, is sufficient on demurrer.

Guardian of minor: Power to sell mortgage. The guardian of a minor has the right to collect and receive money due to his ward on bond and mortgage, or to sell and assign the bond and mortgage in the exercise of his discretion as guardian.

Foreclosure bill: Parties. Minors whose guardian has assigned a mortgage which he held for them, are not necessary parties to a bill by the assignee to foreclose the same. (b.)

This was a bill for the foreclosure of a mortgage, dated September 9, 1834, given by Enoch Jones to Seaman, Van Wyck and Norton, to secure the payment of a bond in the penal sum of ten thousand dollars, conditioned for the payment of five thousand dollars and interest, on or before September 9, 1839. The bill averred that on February 10, 1835, Seaman, Van Wyck and Norton assigned the bond and mortgage by deed, and for a consideration therein mentioned, to Billop B. Seaman, guardian, etc., of Henry Brockholst Livingston, Jasper Hall Livingston and Catharine Louisa Powell, minors; that the execution of this deed of assignment, which was made in the State of New York, was duly acknowledged in due form of law before D. Hobart, then being a commissioner of deeds in and for the city and county of New York, agreeably to the law of that State; that on May 12, 1835, the deed of assignment was duly registered in the office of

(b.) This point is not alluded to specifically by the chancellor, but it is necessarily covered by the decision.

(a.) A deed is valid as a conveyance as between the parties thereto without any acknowledgment. *Dougherty v. Randall*, 3 Mich., 581.

the register of deeds, in and for the city of Detroit; that on June 18, 1836, the said Seaman, guardian as aforesaid, in consideration of one dollar to him paid by Carroll Livingston, as attorney for *Henry Brockholst Livingston, assigned to said 166 Carroll Livingston the bond and mortgage, and on the same day the execution of the deed of assignment, which was executed in the State of New York, was duly acknowledged in due form of law before John McVickar, junior, then being a commissioner of deeds in and for the city and county of New York, in said State of New York, agreeably to the laws of said State; that said last mentioned assignment was made to Carroll Livingston as attorney, for the sole and exclusive use and benefit of Henry Brockholst Livingston. The bill then averred that a certain amount of interest was due and unpaid on the bond and mortgage, and prayed for decree of foreclosure and sale.

Henry Godard, who was made defendant as subsequent purchaser, demurred to the bill and assigned the following causes:

1. That it does not appear that D. Hobart, before whom *the first assignment was acknowledged, was 167 authorized by the laws of New York to take acknowledgments of conveyances of real estate.
2. That it does not appear that John McVickar, junior, before whom the second assignment is alleged to have been acknowledged, had authority by the laws of New York to take such acknowledgment.
3. That it does not appear by what authority Billop B. Seaman, who is alleged to have been guardian of the minors, and to have held the bond and mortgage as such guardian, assigned, sold and transferred the same.
4. That Joseph Hall Livingston and Catharine Louisa Powell, having an interest in the subject matter, are not made parties.

D. Goodwin, in support of the demurrer, to the point that the guardian's authority was special, and that he could not assign the bond and mortgage unless authorized by statute or by a court

Livingston v. Jones.

of competent jurisdiction, cited *Reeve's Dom. Rel.*, 325-6; *Morrell v. Dickey*, 1 Johns. Ch., 153.

A. D. Frazer, contra, cited as to the authority of the guardian, *Field v. Schieffelin*, 7 Johns. Ch., 150. And to the point 168 that *it did not lie with the mortgagor to object that the power of sale was not regularly acknowledged and recorded, *Jackson v. Colden*, 4 Cow., 266.

THE CHANCELLOR.—The acknowledgment is no part of the instrument of assignment. The allegation in the bill as to the assignments having been duly acknowledged, according to the laws of the State of New York, where the same were executed, are sufficient on demurrer.

The third cause of demurrer assigned, seems to be the point most relied upon by the party demurring.

The bond and mortgage having been duly assigned to Billop B. Seaman, guardian of Jasper Hall Livingston and Catharine Louisa Powell, there can be no doubt that he had the legal right to collect and receive the money due thereon, or sell and assign the same, in the exercise of his discretion as guardian. This principle is fully established in the case of *Field v. Schieffelin*, 7 Johns. Ch., 150; and the allegations in the bill of the several assignments are sufficient upon demurrer.

This is not a claim set up by the infants, alleging fraud in the assignment, but it is a demurrer by Godard, who claims title to the premises as subsequent purchaser from the mortgagor; and, it having been decided that the guardian had a right to assign the bond and mortgage, and that the allegations in the bill of such assignment are sufficient, the demurrer must be overruled.

Demurrer overruled.

Steward v. Stevens.

John Steward and others v. Israel C. Stevens and another.

Jurisdiction: Creditor's bills. The jurisdiction of the court of chancery to apply the property of the defendant, which is beyond the reach of an execution at law, to the satisfaction of the debt due to the judgment debtor, proceeds upon the ground that the remedy at law is exhausted.

Creditor's bills: Return of execution. An execution cannot be legally returned unsatisfied until the return day.

Where a return "unsatisfied" was actually made upon the execution, and a creditor's bill was filed before the return day, a demurrer to the bill was sustained on the ground that the remedy at law was not exhausted. (a.)

This was a creditor's bill, filed September 5, 1838, and set forth that the complainant recovered a judgment in the circuit court for the county of Wayne, against the defendant Stevens, on May 24, 1838, for the sum of \$506.23 damages; that on July 12, 1838, a *fiery facias* was issued on said judgment, returnable on the third Tuesday of November following; that on August 28, 1838, the sheriff returned the said writ of *fiery facias* with a return indorsed thereon, that "after due and diligent search he had not been able to find any goods and chattels, lands and tenements of the defendant, and therefore he returned the said writ of *fiery facias* unsatisfied." The bill alleged that the full amount of the judgment remained unsatisfied, and contained the other allegations usual in creditors' bills, and prayed for a discovery, etc.

To this bill the defendants demurred, assigning for special cause, *first*, an objection to the form of the *fiery facias* as set forth; *second*, an objection to the form of the sheriff's return; and *third*, *fourth* and *fifth*, that the return was premature, and consequently the remedy at law was not exhausted, and the creditor's bill could not be sustained.

Geo. E. Hand in support of the demurrer.

(a.) See *Eldred v. Mack*, *supra*, 162, and cases cited in note.

Steward v. Stevens.

Henry N. Walker, contra.

THE CHANCELLOR.—The first and second causes of demurrer assigned, it is not necessary now to consider.

The third cause of demurrer is well taken, and is conclusive. The *feri facias* was returned, and the bill filed a long time before the return day. The jurisdiction of this court to apply the property of the defendant, which is beyond the reach of execution at law, to the satisfaction of the debt due to the judgment creditor, proceeds upon the ground that he has exhausted

171 *his remedy at law. (*Cassidy v. Meacham*, 3 Paige, 312.)

Until the return day of the execution, it is the duty of the officer to seize and sell any property of the defendant found within his county. The execution, therefore, cannot be considered as legally returned unsatisfied until the return day.

In the case under consideration, it does not appear but that the officer, before the return day of the *feri facias*, could have found property sufficient to satisfy the judgment. The statute (*R. Stat.*, 365, sec. 25) provides, that "whenever an execution against the property of the defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant," etc.

This section is similar to a provision of the revised statutes of New York, and in that State it has been uniformly held that a creditor's bill cannot be properly filed until after the return day of the execution issued on the complainant's judgment, although the execution had been actually returned before the return day. (See *Beck v. Burdett*, 1 Paige, 305; *Edmeston v. Lyde*, *Ib.*, 637; *Clarkson v. De Peyster*, 3 Paige, 312, 320; *McElwain v. Willis*, 9 Wend., 560.) And this is unquestionably the true rule. A defendant ought not to be harassed by a suit in chancery, when he has property which can be reached at law, during the life of the execution.

The demurrer is well taken, and must be sustained.

Demurrer sustained.

Kirby v. Ingersoll.

Zebulon Kirby v. Justus Ingersoll and Nehemiah Ingersoll.

Partners, implied power of. One partner may bind his co-partner in all matters within the scope of the co-partnership; the implied authority of one partner to bind his co-partner is generally limited to such acts as are in their nature essential to the general objects of the co-partnership.

Partners, general assignment by one. One partner cannot make a general assignment of the partnership effects to a trustee for the benefit of the creditors of the firm, without the knowledge or consent of his co-partner, when he is on the spot, and might have been consulted.

There is no implied authority resulting from the nature of the contract of co-partnership, that will authorize one partner to make a general assignment of the partnership effects, without the knowledge or consent of his co-partner.

Partners, implied power of. The authority impliedly vested by each partner in the other is for the purpose of carrying on the concern, and not for the purpose of breaking it up and destroying it.

One partner does not, by any implication, confer a power upon his co-partner of divesting him of all interest in, or authority over, the concern.

One partner may transfer a portion of the assets for the purpose of paying or securing debts, or to raise means to carry on the concern; but the power of divesting entirely one partner of his interest, appointing a trustee for both, and breaking up the concern, is not one of the powers either contemplated or implied by the contract of copartnership.

Covenants, several. Where the covenants and conditions of bonds and other deeds are several, they may be good in part, and void as to the residue.

Deed fraudulent in part is void. The better opinion seems to be, that even at common law a deed fraudulent in part is altogether void.

Fraud, meaning of. By the term *fraud*, the LEGAL intent and effect of the acts complained of is meant.

The law has a standard for measuring the intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the party denies all intention of committing a fraud.

Partners, general assignment by one. The principle upon which general assignments by one partner have been declared void is, that one partner has no authority to make a general assignment of the partnership effects in fraud of the rights of his co-partner to participate in the distribution of the partnership effects among the creditors.

Illegal conveyance void. The construction to be put upon a deed conveying property illegally is, that the clause which so conveys it is void equally, whether the illegality be by statute or at common law. This is the rule, except in cases where the statute declares the whole instrument void.

Kirby v. Ingersoll.

Deeds void in part. One good trust inserted in an illegal instrument of assignment cannot make that instrument a valid one.

A grantee, who voluntarily becomes a party to a deed which is fraudulent in part, forfeits his right to claim benefit from another part which would have been good.

The bill in this case was filed September 5, 1839, and states that November 9, 1833, complainant and Justus Ingersoll, one of the defendants, entered into a co-partnership in the trade and business of tanners, curriers, and dealers in leather; that they were to be equally interested, and devote their time and skill to the management of the business, under the firm and style of "Ingersoll & Kirby," and were to share the profits equally. That the co-partnership agreement was not reduced to writing; was to continue so long as they should be satisfied with each other.

That immediately on entering into the co-partnership, the firm of Ingersoll & Kirby purchased stock in trade to a large amount; that they purchased out the business of a firm then trading in the city of Detroit, under the name of "Justus Ingersoll & Co.," and undertook to pay the liabilities of said firm, to the amount of the stock received from said firm, one of which was a debt to complainant of about \$900. That at the time of forming the co-partnership, said Justus resided at Medina, in the State of New York, and continued to reside there until September, 1838, when he removed to Detroit; that during his residence in the State of New York, said Justus did not devote his time to the business of said firm, but was exclusively engaged in conducting and carrying on his own private business, for his own exclusive benefit. That complainant resided at Detroit, where the business of said firm was carried on, and devoted his whole time to the business of said firm; that the business of said firm became prosperous and lucrative, and was carried on without any material disagreement until about the month of November, 1838, when some difference of opinion arose as to the mode of conducting the business, and the said Justus expressed a desire to close the said co-partnership business; that complainant expressed his willing-

Kirby v. Ingersoll.

ness to dissolve the co-partnership as soon as the business of the firm could be placed in a situation to secure to the creditors of the firm the immediate payment of their debts. That immediately complainant directed the whole of his attention to the payment of the liabilities of the firm, and to the collection of the outstanding debts due to the firm; that the liabilities of the firm had been reduced, during ten months last past, about \$11,000.

*That complainant and said Justus had from time to 174 time, as fast as they could without prejudicing the rights or interests of the creditors of the firm, since that time divided between them certain of the property of the firm, so as to hold the same in severalty, and not as partners; that among the property so set apart to complainant there were about 728 sides of upper leather, of about the value of \$2,000. That there was assigned to said Justus as an offset for the property so assigned to complainant, about 540 hides, of about the same value as those assigned to complainant; that said Justus took possession of the property so assigned to him, and shipped the same to Medina, in the State of New York; that complainant took possession of the property so assigned to him, and packed the same away apart from the partnership property, but leaving the same in the same building where the co-partnership business was carried on, and in a building contiguous thereto. That at various other times there were other divisions of the property of said firm between complainant and said Justus, with the view and intent to close the said co-partnership business as fast as the same could be done without hazarding the interests of the creditors or materially injuring the business of the firm. That the property so set aside to complainant and said Justus, by amicable division, was not charged or entered against either on the books of the firm. That August 28, 1839, while the business of the firm was so in progress of final settlement, the said Justus Ingersoll, without any previous consultation with complainant, and without complainant's knowledge or consent, made or pretended to make an instrument

Kirby v. Ingersoll.

of assignment or indemnity to one Nehemiah Ingersoll, and in which assignment it was, among other things, set forth that complainant and said Justus were jointly indebted to James Abbott, of the city of Detroit, for rent, accruing on a certain lease, bearing date April 11, 1836, and that said Nehemiah was liable to pay the said rent by reason of a bond signed by him for the said firm. And that it was further set forth in said assignment that said Nehemiah was liable upon a certain bond bearing date

November 19, 1835, executed by him to the Farmers and
175 Mechanics' *Bank of Michigan, for the benefit of said firm of Ingersoll & Kirby, in the penal sum of \$20,000, conditioned to pay the sum of \$10,000, or the amount of the indebtedness of the said firm to said bank, not to exceed that sum, and that the present indebtedness of the firm of Ingersoll & Kirby to the said bank, for which said Nehemiah was liable, was about \$10,000. That said Nehemiah was also liable as indorser of a promissory note of said firm for the sum of \$2,000, and that said firm were willing not only to secure and indemnify the said Nehemiah, etc., on account of his liability on the bond, but also to pay him the \$2,000 and to secure to all other creditors of said firm the payment of their just debts, out of the moneys and effects of said firm after such indemnification and payment to said Nehemiah, and for the purpose of such indemnification, the said Justus, using the name of the said firm of Ingersoll & Kirby, assigned to said Nehemiah the stock in trade, or the greater proportion of it, amounting in value to about the sum of \$9,000, and notes and accounts belonging to said firm to the amount of about \$6,000, and in and by said deed of assignment gave said Nehemiah full authority to sell and dispose of all the said property, and collect all the said debts, and apply the proceeds of the same to the payment:

- 1st. Of the \$2,000 due to him as indorser of said note.
- 2d. To pay off and satisfy any debts due from said firm which the said Nehemiah was in any manner bound to pay; and
- 3d. To pay and satisfy any other debt or debts justly due or

Kirby v. Ingersoll

owing by said firm; to retain out of the moneys collected a reasonable sum for his services, and to pay over to said Justus and complainant the residue, etc.

The bill states that said Nehemiah is a brother of said Justus, and charges that said Justus was largely indebted, individually, to said Nehemiah, for money loaned of him, and that said assignment was made by said Justus not for the purpose of securing any debt owing by said firm of Ingersoll & Kirby to said Nehemiah, or for securing or indemnifying him against any debt or demand owing by the firm for which said Nehemiah

*is security; that said firm was in good credit at the time 176 of making the assignment, and was then able to pay all its liabilities and obligations; that said Nehemiah had been the indorser of said firm during the whole time of its continuance, and that there was not at the time of filing the bill any paper on which said Nehemiah was liable, except that which is held as collateral to the debts of said firm; that said Nehemiah never became liable to pay any sum for the firm, by reason of the protest for non-payment of the liabilities of said firm; that said firm are not indebted to the Farmers' and Mechanics' Bank in the sum of \$10,000, but that their whole indebtedness to said bank is \$6,700, no part of which was yet due; that since said assignment complainant has been prevented from attending to the business of said firm, and when complainant applied to examine the books and papers of the firm, he was abruptly refused, and told by said Justus that the papers, books, notes and accounts of the firm were left in his, the said Justus' charge and care by said Nehemiah, and that complainant could have no access to them.

The bill further states that there is a large amount of property, consisting of leather, hides and other stock, belonging to said firm, which is not mentioned in the said assignment, which is now in the possession of said Nehemiah and said Justus, which complainant fears will be wholly lost to said firm unless some person duly authorized should take possession of the same; that there is also a large amount of notes and accounts due to the firm, which are not

Kirby v. Ingersoll.

assigned, but are in the possession of said Nehemiah and said Justus, and said Nehemiah has demanded payment of the same; that said Justus, in said assignment, has recognized a claim in favor of said Nehemiah to the amount of \$2,000; that instead of the same being a true and just account, said Nehemiah justly owes the said firm of Ingersoll & Kirby the sum of \$1,200; that immediately after the said assignment, said Justus caused a notice of the dissolution of the co-partnership to be published; that some of the stock on hand consists of hides, now in the progress of tanning, which requires the constant attention of a
177 *large number of hands to fit them for market, etc.; and that there is danger of the property of said firm being squandered and the creditors defrauded, etc.; charges said Nehemiah to be irresponsible, etc., and that he is disposing of the property, etc.

The bill prays for an account, for an injunction, and the appointment of a receiver. Injunction granted.

The answer admits the co-partnership, the purchase of the stock, etc., of the firm of J. Ingersoll & Co., to the amount of \$15,000; admits the indebtedness of the firm of J. Ingersoll & Co. to the complainant in about the sum of \$900, and that that amount was credited to complainant as so much capital paid in at the time of entering into the co-partnership; states that complainant had been employed as clerk and agent for the firm of J. Ingersoll & Co., and in consequence of inaccuracies in the statement of the affairs and inventory of the property of the firm of J. Ingersoll & Co., made by complainant, said Justus (in order to compromise the matter and enable the firm of Ingersoll & Kirby to proceed with the business) was obliged to pay Rufus Ingersoll and John Bagley (two of the members of the firm of J. Ingersoll & Co.) in the years 1833-4, the sum of about \$3,600 out of his individual funds. Admits that complainant conducted the business of the firm at Detroit; states that complainant made all the sales, received all payments, and that it appeared from the books of the firm up to May 14, 1835, that payments had been made to

Kirby v. Ingersoll

Rufus Ingersoll and John Bagley, to the amount of about \$7,790; admits that said Justus resided at Medina, in the State of New York, up to 1838, as stated in the bill, at which place he was engaged in attending to his own business; but states that by the partnership agreement, said Justus was relieved from devoting any part of his time to the business of the firm; states that the firm of Ingersoll & Kirby purchased large quantities of hides at Detroit, and sent them to said Justus to be tanned at his establishment at Medina; that the costs and charges of said Justus, which he had charged against the said firm, for tanning said hides, amounted to about the sum of \$10,000; *states 178 that during the continuance of the said partnership, said Justus had sent from his establishment at Medina, to the store of the firm at Detroit, large quantities of leather, oil and other materials, to be sold at and used in and about the business of the firm of Ingersoll & Kirby, at Detroit, to the amount or value of about \$8,000. The answer further states and charges that the purchases made by complainant on account of said firm amounts to about the sum of \$122,000; states that no cash book was kept by complainant, and that complainant was extremely negligent in keeping the books of the firm; that complainant had appropriated a large amount of funds of the firm to his own use, without giving any account therefor; that he had committed gross frauds upon the rights of said Justus, in managing the affairs of said firm; that some time in the month of August, 1839, said Justus declared to complainant in positive terms that he should make an assignment of the partnership effects, for the purpose of paying and securing the debts of the firm, and that he should proceed immediately to dissolve the partnership, to which complainant did not object; that August 27, 1839, said Justus, in the name of the firm of Ingersoll & Kirby, made, executed and delivered the assignment referred to in the bill to said Nehemiah Ingersoll, who is brother to said Justus; that complainant had frequently, before making said assignment, expressed his willingness that said Justus should sell and transfer all his interest to said Nehemiah, and that he

Kirby v. Ingersoll.

would be fully satisfied with any arrangement which said Nehemiah should recommend for the final settlement and adjustment of all the affairs of said firm; admits there was some conversation about making a division of a part of the property of the firm, but denies that any such division ever was made as is set up in the bill; that it was agreed by complainant and said Justus that said Justus should tan all the raw hides which should be sent to him at his establishment at Medina, for which said Justus was to be allowed a reasonable compensation by the firm of Ingersoll & Kirby; that it was known and approved of by said complainant that said Nehemiah was, from time to time, during several
179 *years, advancing money to said Justus for the benefit and on the credit of the firm of Ingersoll & Kirby, which was used by said Justus in the business of said firm, and for the payment of which the faith of said firm was pledged; avers that the balance due from the firm to said Nehemiah, at the date of the assignment, was at least \$1,600, which said firm was legally and equitably bound to pay; denies that said Nehemiah is a debtor to the said firm; states that said Nehemiah has indorsed for said firm, since its commencement, to the amount of \$60,000; that he was at the time of the assignment directly liable to the said Farmers' and Mechanics' Bank for said firm to the amount of \$6,700; that he is further liable for the payment of rent to James Abbott for said Justus and complainant; avers that the assignment was made for the purposes therein expressed, and no other, and that it was made after full notice by said Justus to said complainant of his intention to make an assignment of the partnership property; denies that all the property of the firm is not mentioned in the assignment; denies that the firm was in good credit at the time of making the assignment. The answer further states and charges that complainant has, since the commencement of said partnership, received as net profits arising from the business of said firm the sum of \$73,000; that the whole amount received by said Justus from said firm, individually, does not

Kirby v. Ingersoll.

exceed the sum of \$20,000; denies that said Nehemiah is insolvent; also denies all fraud in making the assignment.

The complainant now moves for the appointment of a receiver, and the defendants move for a dissolution of the injunction.

Walker, Porter and Goodwin, for complainant.

As to the power of one partner to assign partnership property, see *Gow on Partnership*, 74, and note; *Collyer on Partnership*, 217, and note; 1 *Dessaus. Rep.*, 537; 4 *McCord Rep.*, 519; 5 *Cranch*, 300; 4 *Day's Rep.*, 428; 4 *Wash. Cir. C. Rep.*, 232; 3 *Paige Rep.*, 523; 5 *Paige Rep.*, 30.

**J. M. Howard*, for defendants.

180

It is admitted by the pleadings that complainant and J. Ingersoll were at the time of the assignment partners in trade, and that the assignment was made by J. Ingersoll in the name of the firm.

The first question, therefore, which arises, is as to the power of Justus Ingersoll to make the assignment, irrespective of the fraud charged in the bill, which is fully denied by the answer.

The very relation of partners implies a confidence in each other; such a confidence as makes each partner the general agent of the others, and renders his contracts in their name and in reference to the partnership effects the contracts of all the others. In all simple contracts they are regarded as one contracting party; and they are all bound, provided the contract has reference to the co-partnership (*Gow on Part.*, 53, 54, 55); and such has been the law since the time of James I. (*Ib.*, 73-75.)

And Lord Mansfield declared that each partner has the power, singly, to dispose of the whole of the partnership effects; *and this results from the principle that partners are joint 181 tenants; one joint tenant may lawfully dispose of the whole, which is not the case with tenants in common. (*Fox v. Hamburg*, 3 *Coup.*, 445; *Barton v. Williams*, 5 *B. and Ald.*, 395; 12 *Mass.*, 54; and see 10 *Peters*, 360.)

With regard to all effects contributed, manufactured or pur-

Kirby v. Ingersoll.

chased to be sold for the benefit of the partners, each partner in the course of trade has an absolute right to dispose of the whole, and may assign it by way of pledge or security. (*Watson on Part.*, 67; *Purson v. Hooker*, 3 *Johns.*, 70, 71; *Mills v. Barber*, 4 *Day*, 425; *Harrison v. Sterry*, 5 *Cranch*, 289.) The sale of one partner is the sale of both; and such is the unity of right and interest, that one partner may enter the appearance of the other in an action against all. (*Gow on Part.*, 79, 195, and *appendix*, page 494; 7 *T. R.*, 108.)

The case of *Dickinson v. Legare*, 1 *Dessaus.*, 537, is the first case in England or the United States in which the principle has been denied; but it should be remembered that it was the case of one partner making an assignment while a prisoner of war in the enemy's country and to an alien enemy; and this has not been sanctioned by any other decision, but overruled in *Robinson v. Crowder*, 4 *McCord*, 518, and in *Egberts v. Woods*, 3 *Paige*, 523.

The only point decided in *Havens v. Hussey*, 5 *Paige*, 30, is "that one partner cannot, without the consent and against the known wishes of his co-partner, execute an assignment of all the partnership effects to a mere trustee for the benefit of the favorite creditors of the assignor." The case at bar differs greatly from that. Here the assignment is made directly to a creditor of the firm. The answer shows that the firm owe him about \$1,600, and denies that the assignment was made against the known wishes of the complainant, and shows that he had every reason to suppose—indeed, that he was directly notified—that it would be made, and that he did not dissent. Here the assignee is

182 authorized to retain the amount of *his debt; and being responsible as indorser for the firm to the amount of the \$2,000 note, and bound by his obligation to the Farmers' and Mechanics' Bank to the amount of \$7,000 for *their* benefit, and also to James Abbott for the payment of the rent of the premises leased by him to Ingersoll & Kirby, he is authorized, in order to secure and indemnify himself, to sell the property assigned, to pay the debts for which he is liable, and to indemnify himself out of

Kirby v. Ingersoll.

the proceeds; after which payment and indemnification, he is required to account to the partners for the residue of the fund.

The authorities make no distinction between the power to sell and the power to indemnify by pledging the property; and they all agree that it is the right of one to appropriate the joint property for the payment or security of the debts of the firm, in such manner and by giving such preferences as he may think proper; and that preferences may be created, even if the firm is insolvent. (3 Paige, 525, 526; Wakeman v. Grover, 4 Paige, 36; 1 Dallas, 248; 7 Mass., 257.)

So far as N. Ingersoll has an interest in the assignment, he holds the property as a personal security, with full authority to sell, and out of the proceeds to cancel his liabilities for the firm, having first retained the amount due himself, and the residue of the fund is to be applied in payment of any debts which the firm may owe, *without preference of one creditor to another*. There is no *inequality*, no authority to compound with the creditors, and no *terms* whatever requiring them to discharge their debts for less than the amount legally due; were there such terms the assignment would be void. (2 Binney's R., 174; 4 Dallas' R., 76; 4 Paige, 38-9.)

The decision in *Havens v. Hussey* conflicts with that in *Harrison v. Sterry*; and without any precedent to justify it, Chancellor Walworth declares an assignment by one partner to a *trustee*, void in law and equity, for the reason that it is no part of the partnership business "to appoint a *trustee* of *all* the partnership effects for the purpose of selling and distributing the proceeds among the creditors in *unequal proportions*." But as if not satisfied with this decision, the same learned judge *brings this 183 question again into doubt in the case of *Mills v. Argal*, 6 Paige, 582, in which he says, "there may be *some doubt* as to the right of the general partner (it was a special partnership under the New York statute) to make an assignment of all the partnership effects to a trustee, for any purpose, without the

 Kirby v. Ingersoll.

express or implied assent of the special partner." The case was, however, decided on other grounds.

But the law presumes the assent of the creditors to the trustee, until they express their dissent, and their rights cannot, therefore, be disturbed. (*DeForest v. Bacon*, 2 Conn. R., 633.)

The question then arises, can the security which was placed in the hands of N. Ingersoll by the assignment be wrested from him? or, in other words, does the clause constituting him a trustee (an event which, by the way, may never happen) for the remaining creditors vitiate and annul the whole contract of assignment?

That security was so given in pursuance of the authority possessed and exercised by Justus Ingersoll as a partner. (See 5 *Paige*, 31.)

A. D. Fraser, on same side.

It is competent for one of several partners to make an assignment of the co-partnership property. (*Fox v. Hanbury*, Cowper, 445; *Barton v. Williams*, 5 Barn. & Ald., 395; *Pierson v. Hooker*, 3 Johns. R., 70; *Lyles v. Styles*, 2 Wash. C. C., 224; *Lamb v. Durant*, 12 Mass., 54; *Pierpont v. Graham*, 4 Wash. C. C., 232; *Mills v. Barbor*, 4 Day's Rep., 428; *Harrison v. Sterry*, 5 Cranch, 289; *Robinson v. Crowder*, 4 McCord's R., 519; *Egberts v. Wood*, 3 *Paige*, 517; *Gow on Part.*, 51, 53, 54, 73, 74, 75, 79; *Appendix*, *Taylor's case*, *Coll. on Part.*, 216, 217; *Watson on Part.*, 67.)

That a deed may be good in part, and void for the residue, is the common law doctrine. (*United States v. Bradley*, 10 Peters, 243, 360; *Pigot's case*, 6 Coke Rep., part 11, 27.)

THE CHANCELLOR.—This case presents the broad question *of the right of one partner to make an assignment of all the partnership effects, without the consent or concurrence of his co-partner, who is on the spot, and acting in the business of the co-partnership. Perhaps no question has been presented to this court of greater practical importance than the present; and it has been considered with a full and deep conviction of the responsibility imposed upon the court in its decision.

Kirby v. Ingersoll.

The authority of one partner to make such an assignment, if sustained in the present case, must be sustained in its broadest form. The two partners were both, at the time of the assignment, in town, and attending to the business of the firm. The complainant, on proceeding to the usual place of business, finds the brother of the other partner in possession, and is informed that an assignment of all the partnership effects has been made, and is denied all access to the books, and all interference with the property or business of the firm.

The allegation in the answer, that the subject of an assignment had been mentioned to the complainant, to which he made no objection, cannot aid the assignment. It is not pretended that at the time of actually making the assignment he was advised of it, or was in any manner consulted as to either the assignee, the terms and conditions of the assignment, or anything else; but that the first notice to him was the information that he no longer had anything to do with the partnership property or business.

Very different views seem to have been entertained upon this subject, and it has become necessary to examine it with care and attention.

It will be found that the *dicta* relied on to sustain the powers of one partner to make such an assignment, have been thrown out under special circumstances, and that the reports, upon a careful examination, do not sustain the exercise of the power in cases like the present. The elementary writers, Gow and Collyer, state the rule to be that one partner may bind the others in all matters within the scope of the co-partnership, and the implied authority of one partner to bind another is generally limited to such acts as are, in their nature, essential *to 185 the general objects of the co-partnership. Does this rule contemplate the authority here contended for?

Is it intended that when both partners are on the spot, and where no difficulty exists in consulting each other as to the assignee, and the terms and conditions of the assignment, that by the law of partnership they are placed in such a position that

 Kirby v. Ingersoll.

one partner, on repairing to the place of business, may find all he possesses, together with the books and accounts of the firm, transferred to a third person, placed entirely beyond his reach, himself utterly excluded, and the business of the firm ended without his knowledge or assent? This cannot be contemplated.

Do the authorities cited sustain the position? The case which has gone as far as any other, and much relied on in the argument, is the case of *Harrison v. Sterry*, 5 Cranch, 289. In that case the question did not turn upon this point. But a question was raised upon the validity of an assignment made by one partner.

The court say in delivering the opinion: "The whole commercial business of the company in the United States was necessarily committed to Robert Bird, the *only* partner residing in the country. He had the command of their funds in America, and could collect or transfer the debts due to them." And it is manifest from the case that the assignment was made of a portion only of the assets to obtain aid in carrying on the concern. This case from the entire showing manifests clearly that this is an exception rather than the rule, and that it was made under special circumstances; and such will be found to be the case in 2 Cowper, 445, also much relied upon. Indeed, I have been unable to find any case where the broad power here asserted has been sustained. Chancellor Walworth, it is said, has countenanced this principle in the case of *Egbert v. Woods*, 3 Paige, 517; and it is unjustly, I think, said, that he virtually decreed both ways, and that there is a discrepancy between the above case and that of *Havens v. Hussey*, 5 Paige, 31.

In the first case he says: "I do not intend to express
 186 an *opinion in favor of the validity of such an assignment of the partnership effects to a trustee by one partner against the known wishes of his co-partner, and in fraud of his right, to participate in the distribution of the partnership funds among the creditors, or in the decision of the question which of those creditors should have a preference in payment out of the effects of an insolvent concern." Showing clearly that after an exam-

Kirby v. Ingersoll.

ination of the whole subject he did not believe in the validity of such an assignment. In the case of *Havens v. Hussey*, he says: "Upon the most deliberate examination, he was satisfied that the decision of the vice-chancellor was correct, that such an assignment is both illegal and inequitable, and cannot be sustained." And further he says: "It is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors, in unequal proportions. And no such authority can be implied. On the contrary, such an exercise of power by one of the firm without the consent of the other, is, in most cases, a virtual dissolution of the co-partnership, as it renders it impossible for the firm to continue its business.

From a review of all the cases, it is clear that this power, if sustained at all, must be sustained upon the implied authority for that purpose from his co-partner, resulting from the nature of the contract of co-partnership. There is no such implied power. The authority impliedly vested by each partner in the other is for the purpose of carrying on the concern, and not for the purpose of breaking it up and destroying it. One partner does not, by any implication, confer a power upon his co-partner of divesting him of all interest in or authority over the concern. The elementary writers upon the subject do not sustain this position. The adjudged cases, when carefully examined, do not sustain it; and assuredly it is not sustained by the reason of the thing or the dictates of justice. Every consideration of public policy or commercial convenience is against it. The result to which I have arrived is, that a partner *may transfer a 187 portion of the assets or obligations for the purpose of paying or securing debts, or to raise means to carry on the concern; but that the power here asserted of divesting entirely one partner of his interest, appointing a trustee for both, and breaking up the concern, is not one of the powers either contemplated or implied by the contract of co-partnership; and it is best that it should be so. Else, who could with safety enter into such a connection?

Kirby v. Ingersoll.

On the other hand, if partners cannot agree, and one partner is violating his duty or endangering the rights of the other, the remedy is plain and adequate.

This assignment is partly for the purpose of securing the debts and liabilities of the firm to the assignee, as well as for the purpose of making him a general trustee for the firm. It was urged at the hearing that if the assignment was void in other respects, it must be carried into effect thus far. I am inclined to the opinion that effect may be given to the assignment to that extent, but it is not now necessary to decide this question.

From the views I have taken of this case, it must result in the appointment of a receiver, and the application of the assets must be under the direction of the court.

There are other considerations which render the appointment of a receiver appropriate in this case. It is contemplated by the assignment to secure the assignee from his liability for the payment of money due upon a lease having some twenty-five years to run, and clearly not within the scope of the partnership.

The amount of the indebtedness of the firm to the assignee is a disputed one. It will follow, then, that a receiver must be appointed, and the assignee directed to deliver over to such receiver the partnership property and effects, and account with the receiver for whatever shall have come to his hands by virtue of such assignment.

The counsel for the defendants requested to be further heard upon the question of the appointment of a receiver, which request was granted.

188 **A. D. Frazer* for defendants.

The court having decided that the assignment ought to be set aside, the complainant now insists that the property embraced in the assignment must go into the hands of a receiver. This position is denied by the assignee, who insists that it necessarily follows from the decision which has already been made that the

Kirby v. Ingersoll.

trust shall remain with him on whom the assignment conferred it. He submits that he cannot be deprived of it, unless the case falls within some of the exceptions to be found in adjudged cases upon this subject. The assignee contends that the only legal operation and effect of the decision which has been made must be to render inoperative that part of the assignment which purports to create a trust for the benefit of those mentioned in the assignment, other than the assignee. If the assignment is good for any beneficial purpose, the assignee cannot be divested of the power and rights conferred on him by it, unless the fund be in danger, or some other strong ground urged which would justify the appointment of a receiver; and while he acts as assignee he is as much under the control and direction of this court as a receiver would be, and bound to execute the trust, modified, limited and qualified, as the court have already decided it must be.

Under these circumstances, it is contended that a receiver will not be appointed unless the property is shown to be in danger; that the trustee is irresponsible, or where the plaintiff's right is not shown to be clear; must show some evil actually existing, or danger to the property, or a strong special case of fraud. (*Edw. on Receivers*, 2 Ch.; *Willis v. Corlis*, 2 Edw., 286, 287, 288; *Orphan Asylum v. McCartee*, 1 Hopk., 429; *Verplanck v. Caines*, 1 Johns. Ch., 58; *Hugonin v. Baseley*, 13 Ves., 105; *Middleton v. Dodswell*, Id., 266; *Lloyd v. Passingham*, 16 Ves., 59.)

This assignee is subject to the control and direction of this *court as much as a receiver would be. (*Shaftsberry v. Arrowsmith*, 7 Ves., 486, 487; *Beaufort v. Berty*, 1 P. Wms., 702.)

H. N. Walker, in reply.

The complainant insists in this cause that the deed of assignment is void, *ab initio*, for the following reasons.

1. That one partner cannot assign the partnership goods without the assent of his co-partner. This position having, as a general rule, already been settled by this court, it is unnecessary to

Kirby v. Ingersoll.

say anything upon it. The case of *Havens v. Hussey*, 5 Paige, 30, lays down the true doctrine.

2. But this case is sought to be taken out of the rule on the ground that the deed of assignment constituted Nehemiah Ingersoll, the brother, a trustee as respects all the creditors of the firm of Ingersoll & Kirby but himself, and that he acquired an individual right to the goods assigned, they having been assigned to him to secure the amount due him from the firm, and his liability for them as an indorser.

The decision that one partner cannot assign the partnership effects, seems to settle this question. The doctrine contended for by the counsel opposed is that the deed may be good in part and bad in part. This doctrine does not apply in this case. It is only applicable where there are different clauses or covenants in a deed which do not depend on each other. But where the deed is entire, and the several clauses depend upon each other, then the distinction ceases, and it must either be good for the whole or bad for the whole. (1 *Shep. Touchstone*, 70, 71.)

It is a necessary requisite that the person making the deed be able to contract. This is not the case here. (*Havens v. Hussey*, 5 Paige, 30; 1 *Shep. Touchstone*, 54.)

It is a well established rule in courts of equity, that interests of third persons gained by fraud, imposition, or even undue influence over others, cannot be held by them. The interest of the assignee here, if he has any, has been gained by the fraud of

Justus Ingersoll. (*Hugonin v. Baseley*, 14 Ves., 273, 289;
190 *Bridgeman v. Green*, Wilmot, 64; *Hildreth v. *Sands*, 2
Johns. Ch., 35, 42; *Shep. Touchstone*, 66, 67.)

In cases of alleged fraud, the answer of the party is not to be relied upon as to any advances, but positive proof is required. (3 *P. Wms. R.*, 228; 2 *Ves.*, 516.)

In the case of *Sands et al. v. Codwise et al.*, 4 *Johns.*, 536, the court said that no right can be deduced from an act founded in actual fraud. The cases in which a deed is set aside on terms are not at all analogous to this.

Kirby v. Ingersoll.

THE CHANCELLOR. Upon a former occasion, it was held that the assignment in question could not be sustained, so far as it purported to be a general one, to a trustee for the payment of his own debt, in the first instance, and also as a general trustee for all the creditors. It was then said that it would follow that a receiver must be appointed.

The reasons that induced the court to come to that conclusion were then stated. A further reason is urged, that it appeared by the answer that a considerable portion of the property of the concern had been sold before filing the answer, notwithstanding the injunction.

On that occasion the court remarked that it was not contemplated to decide the question whether the assignment could be sustained, so far as it purported to constitute a security to the assignee, he being a creditor; but it was said that the court was inclined to the opinion that it could be so far sustained, on the authority of the case in *10 Peters, 363*. The counsel for defendants requested to be further heard on the question of the appointment of a receiver, and it has also been urged that a decision upon the validity of the assignment should be now entered; so that, if the defendants desire to enter an appeal, it may be done, and a decision had in the appellate court. This is certainly proper and desirable. In a question of this importance, both in regard to principle and amount, every proper facility for an appeal should be afforded. This has compelled the court to examine this question, which, as it was not contemplated then to dispose of it, had not before been done. In the case of *United States v. Bradley, 10 Peters, 363*, which *was a case 191 arising on a paymaster's bond, it was held, when the covenants and conditions are severable, that bonds and other deeds may be good in part, and void as to the residue. In *Hyslop v. Clarke, 14 Johns. Rep., 464*, Van Ness, in giving the opinion of the court, says: "The better opinion seems to be that, even at common law, a deed, fraudulent in part, is altogether

Kirby v. Ingersoll.

void." This view seems to have been sustained and carried out in the subsequent decisions in New York.

By the term fraud, it should be remembered that the legal intent and effect of the acts complained of is meant. The law has a standard for measuring the intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the parties deny all intention of committing a fraud. (*11 Wend.*, 224.)

The principle upon which assignments of this kind have been declared void is, that one partner has no authority to make a general assignment of the partnership effects, in fraud of the rights of his co-partner to participate in the distribution of the partnership effects among the creditors. (*Havens v. Hussey*, 5 *Paige*, 31.)

The implied authority of one co-partner is that he may perform any act within the scope of the co-partnership which may be necessary to carry on the concern. Under this implied power it has been held that one partner may assign such portion of the partnership effects as may be necessary in payment of a debt, or to secure a creditor. But this is a general assignment, and, if sustained at all, breaks up and puts an end to the co-partnership. If sustained, and the assignee is authorized to go on and close up the affairs of the concern, does it not necessarily lead to all the consequences intended to be guarded against in the decision in the case of *Havens v. Hussey*? One partner, by selecting a creditor, large or small, as the assignee, may effectually put the other partner out of the possession of his property, and end the business without the knowledge or assent of his co-partner. He is deprived of the right to which the decision in 5 *Paige*, 31, declares he is entitled.

The preferred creditor has been selected without his knowledge *or consent; and a party, who has been illegally placed in possession of the entire partnership effects, if the views urged by the counsel of the defendants are sustained, is entitled to the custody, and has the right to settle and wind up

Kirby v. Ingersoll.

the concern. One good trust could always be inserted, and thus the partner would do indirectly what could not directly be done. Whatever view may be taken of the question, as to whether this assignment may be void in part only, or *in toto*, it seems to me inevitable that, as the case now stands, a receiver should be appointed. But, as it is urged that a decision be now entered upon the validity of the assignment, and it seems but just and proper that it should be done, I shall do so according to the best reflection I have been able to give it.

A distinction seems to have been taken, in some of the cases, between instruments void by statute and at common law.

In the case in *Peters*, cited in support of this assignment, it is said, quoting the opinion of Chief Justice Gibbs, that if an act be prohibited, the construction to be put upon a deed conveying property illegally is that the clause which so conveys it is void, equally whether it be by statute or at common law. This is, undoubtedly, the true rule, and there is no reason for any distinction, except where the statute goes further, and declares the whole instrument void. The cases where instruments have been declared good in part, and bad as to the residue, seem to have been bonds which were variant from the statute, or deeds which purport to convey lands, some portion of which the party could not lawfully convey. In the one case the bond may be valid in part only. The rights of no one are interfered with. Effect is given to the bond so far as it is in conformity with the statute. If it contains other conditions or requirements they are declared void.

So with deeds. The grantor may have title to nine hundred out of a thousand acres of land, and may have no right to convey the residue. Still, it would be unjust to deprive the grantee of that to which the grantor had a title, and by giving it effect *pro tanto*, the rights of no one are violated.

Is it so here? The partner has been deprived of all control *over or voice in the disposition of the effects of 193 the co-partnership, without his consent.

Shall effect be given to this proceeding? Can the court say,

Kirby v. Ingersoll.

where the whole effects are mingled together, that it shall take effect as to certain portions of the property, and be void as to the residue? One good trust is inserted, but that cannot make an illegal instrument a valid one. The legal and illegal are so mixed and commingled that, if assignments of this character are sustained to the extent asked, they may as well be sustained *in toto*.

A grantee who voluntarily becomes a party to a deed which is fraudulent in part forfeits his right to claim a benefit from another part that would otherwise have been good. (*14 Johnson's Reports, 465.*) Here the assignee takes a general assignment from a party not authorized to make such an instrument, and I think it cannot be sustained.

The order is that the assignment be set aside and declared void, and that it be referred to a master to appoint a receiver; and that said Nehemiah Ingersoll deliver over to, and account with said receiver, for whatever shall have come to his hands by virtue of said assignment. (a.)

(a.) This case was appealed to the supreme court, and the decree of the chancellor approved in an elaborate opinion by Mr. Justice Felch. See 1 Doug. Mich., 477.

Fay v. Erie and Kalamazoo Railroad Bank.

Fay v. The Erie and Kalamazoo Railroad Bank.

Insolvent banks, dismissal of suit against. Where an individual creditor had filed his bill against a moneyed corporation, obtained an injunction and the appointment of a receiver, and the receiver had taken upon himself the trust, and other creditors had filed their claims, *it was held* that the creditor who had filed his bill, obtained the injunction, and the appointment of a receiver, was not entitled, as a matter of *right* (upon being paid his demand), to dissolve the injunction, dismiss his bill, and discharge the receiver.

There is no doubt that this court has the power, in such case, to dissolve the injunction, discharge the receiver, and permit the party to dismiss his bill, when it is satisfied that the interest of all concerned will be best subserved by permitting the corporation to manage its own concerns.

Dissolution of failing corporations. The primary object of proceeding in chancery against failing corporations is not for the purpose of dissolving the corporation, but to protect the assets for the benefit of creditors. The power to decree a dissolution of the corporation is merely incidental.

Discharging receiver. It is the duty of the court to look into the condition of the corporation before it will discharge the receiver, and make such order, either absolute or conditional, as the case may require.

This was an application, on the part of the complainant, to dissolve the injunction granted in this case, to dismiss the bill, and discharge the receiver. A sufficient statement of the facts in the case will be found in the opinion of the chancellor.

Goodwin and Morey, in support of the motion.

George Miles, *contra*.

THE CHANCELLOR. This application is founded upon an acknowledgment of payment by the creditor, and is a motion on his part to dissolve his own injunction and discharge the receiver. No provision is made for the payment of the expenses incurred by the receiver, or to indemnify him against liabilities.

It is insisted that this application must be granted as a matter

Fay v. Erie and Kalamazoo Railroad Bank.

of right, and that the complainant and defendant having adjusted the debt claimed by the complainant, no other persons have any interest in the matter, or any right to interpose any objections to the order asked.

If no rights, on the part of other creditors, have been
195 acquired *under this proceeding, and the receiver has incurred no liabilities to other creditors, this view is undoubtedly correct. To ascertain this, it becomes necessary to resort to the statutory enactments upon which these proceedings are based.

The act of June 21st, 1837 (*Session Laws of 1837, page 307*), which is the first act bearing upon the subject, provides that proceedings may be commenced by the attorney-general, or by any creditor, and makes no distinction in the mode of proceeding, whether the suit shall have been instituted by either the one or the other.

Section five of the same act provides that the receiver, upon his appointment, shall be vested, *as trustee*, with all the estate, real and personal, liabilities and securities, of such corporation.

The act of April 15, 1839 (*Session Laws, page 94*), further prescribes and defines the duties and liabilities of receivers. (See *sections 11 and 17.*)

This renders it necessary to examine the statute prescribing the powers, duties and obligations of assignees. (*Revised Statutes, page 606.*)

The first section provides that all assignees are declared to be *trustees* of the estate of the debtor, in relation to whose property they shall be appointed, *for the benefit of his creditors.*

After this reference to the various provisions of the statute, the question recurs, may an individual creditor, after having commenced proceeding under the statutes before referred to, and pursued his remedy until a receiver has been appointed, and taken upon himself the trust, and until other creditors have filed their claims, and still, at this late stage of the proceedings, upon being paid his particular demand, as a matter of right, dissolve the

Fay v. Erie and Kalamazoo Railroad Bank.

injunction, dismiss his bill, and discharge the receiver, without any right or duty, on the part of the court, to protect the rights of the other creditors, who may have filed their claims with him, or to protect and save harmless the receiver, who has acted under its authority? I think not.

*The statutes bearing upon the question, it is true, are 196 not very explicit or satisfactory. But, from the examinations I have been enabled to give them, I cannot resist the conclusion that, from a fair construction of their provisions, their object and intent is not solely to afford a remedy to the individual creditor to collect his demand, but that they contemplate, also, the security of such other creditors as may file their demands with the receiver, and thus, so far, become parties to the proceedings.

This view necessarily involves another question: Is it imperative upon the court, after the appointment of a receiver, to hold jurisdiction of the case, and require the receiver to pursue his duties, until the concern is wound up and dissolved, although the party complainant in the suit is satisfied, and declines further to prosecute, and when the proper prosecuting officer on the part of the State is satisfied that the application of this severe remedy is unnecessary; and if, further, the court is satisfied that the interests of all concerned will be best subserved by permitting the corporation to manage its concerns, and that it may be safely done? The court entertains no doubt that it is vested with this power. The primary object of proceedings in chancery, against a failing corporation, is not a dissolution of its charter, for a violation, but to protect the assets for the benefit of the creditors. This power is merely incidental. This court having jurisdiction of the cause for other purposes, the legislature has also conferred the power to decree a dissolution of the charter.

But this is the proper duty of the court of law, and for this purpose proceedings may be instituted at any time in the common law courts, for any violation of the provisions of its charter, by a corporation.

Fay v. Erie and Kalamazoo Railroad Bank.

The conclusion, then, to which I arrive in this case is that it is the duty of the court to look into the condition and circumstances of this corporation, and to make such order, either absolute or conditional, as the case may require, upon such showing made by the parties who press this motion.

Carroll v. The Farmers' and Mechanics' Bank.

Charles H. Carroll v. The Farmers' and Mechanics' Bank and others.

Motion to dissolve injunction. On a motion to dissolve an injunction before answer, an affidavit is admissible which goes to show that the injunction was irregularly issued, or that the officer allowing the injunction was misled and induced to grant the injunction contrary to law.

Injunction bill: Averments. Where the bill seeks a discovery in aid of proceedings at law, the rule is that the complainant must charge in his bill that the facts are known to the defendant and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony; and it must be affirmatively stated in the bill that the facts sought to be discovered are material for such purpose.

When an injunction is asked to stay proceedings at law, it is incumbent upon the complainant to show in his bill the state of the pleadings, and the court in which the suit is pending, in order to enable the officer to whom the application is made for the allowance of the injunction to judge of the propriety of its allowance, and to prescribe the terms on which the same shall be allowed.

Injunction bond. Where the statute requires that, before an injunction shall be issued to stay proceedings which are at issue at law, a bond shall be filed by the complainant, the court cannot dispense with the filing.

Injunction: Comity. Courts of chancery will not sustain an injunction bill to restrain a suit or proceeding previously commenced in a court of a sister State or in any of the federal courts.

The bill in this case was filed to rescind a contract on the ground of false and fraudulent representations, and for re-payment of money paid, etc., and states, among other things, that complainant purchased of Nehemiah O. Sargeant (since deceased), July 28th, 1836, certain property in the village of Kent, State of Michigan, for which he agreed to pay the sum of \$83,000; that said sum of \$83,000 was paid and received as follows: For \$5,000 a draft or check at sight on the Bank of Michigan, in the city of Detroit, was given to said Sargeant, which was paid to him on presentation; a draft or check for \$18,000, payable to the order of said Sargeant ninety days after August 1, 1836, at the Phoenix Bank, in the city of New York; and for the remaining

Carroll v. The Farmers' and Mechanics' Bank.

\$60,000 complainant executed to said Sargeant a bond in the penalty of \$120,000, conditioned to pay the said sum of \$60,000 in twelve annual installments of \$5,000 each.

The bill further sets forth that there had been paid upon said purchase by complainant the sum due at the times following, *to wit: in the month of December, 1836, the draft on the Bank of Michigan of \$5,000; in the month of February following, the sum of \$5,216 on the bond; December 28, 1836, the sum of \$4,942.44 was paid on the check or draft for \$18,000. That at the time of the payments aforesaid, complainant had not discovered the falsity of many of the material parts of the representations of said Sargeant, and was ignorant of the damage which he had sustained by and through the fraud and deceit of said Sargeant. States and charges that said check or draft for \$18,000 was, immediately on receiving the same by said Sargeant from complainant, indorsed by said Sargeant to John A. Welles, cashier and director of the Farmers' and Mechanics' Bank of Michigan, and that said Welles received the same. Charges that said Sargeant was largely indebted to the said Farmers' and Mechanics' Bank. States that said bank, or the officers thereof, received said check at first for collection, and that they had no interest in or title to said check or draft before its maturity. States that a suit was commenced on the check or draft after the same became due in 1838, by said Sargeant against complainant, in the supreme court in the State of New York; that before the trial said Sargeant died and the suit abated. States "that since the death of said Sargeant said Farmers' and Mechanics' Bank claim to be the owners and holders of said check or draft, and have commenced and threaten to prosecute a suit thereon for their own benefit against complainant." Charges that said Farmers' and Mechanics' Bank did not become the holders and owners of said check or draft for \$18,000 before its maturity for a valuable consideration, and without notice of the equities subsisting between said Sargeant and complainant. States "that the facts of the case, so far as the claims of the Farmers' and Mechanics'

Carroll v. The Farmers' and Mechanics' Bank.

Bank are involved, lie especially in the knowledge of the said John A. Welles, the cashier thereof;" "that a discovery from said John A. Welles of the various matters charged is necessary for the enforcement and support of the complainant's just rights in the premises," etc. Prays an injunction to restrain the collection of the note.

*An injunction was allowed by Hon. C. W. Whipple, 199 one of the associate justices of the supreme court.

A motion was made to dissolve the injunction upon the following affidavit:

State of Michigan, Wayne County, ss:

John A. Welles, of the city of Detroit, in the county and State aforesaid, one of the defendants in the above entitled cause, being duly sworn according to law, deposeth and saith, that from reading the bill of complaint filed in this cause, he has ascertained that the president, directors and company of the Farmers' and Mechanics' Bank of Michigan and this deponent are made parties defendants to the said complainant's bill of complaint, by reason or on account of a certain draft, bill of exchange or check drawn by the said complainant on the Phoenix Bank in the city of New York, for the sum of eighteen thousand dollars, which said check or draft was payable to the order of Nehemiah O. Sargeant, ninety days after the first day of August, in the year eighteen hundred and thirty-six; and this deponent further saith, that the said check was discounted by the said Farmers' and Mechanics' Bank while this deponent was present and acting as their cashier; that the amount thereof, less the discount for the time the said draft or check had to run before maturity, was paid to Nehemiah O. Sargeant at the time when the same was discounted.

And this deponent further saith, that the said check or draft was not paid at maturity, but the same was returned to said Farmers' and Mechanics' Bank dishonored; that a suit has been commenced in the supreme court of the State of New York by the

Carroll v. The Farmers' and Mechanics' Bank.

said bank, against the said Charles H. Carroll, the complainant in this suit, for the amount due or unpaid on the said draft or check; that the said suit was put at issue previous to the first day of November, eighteen hundred and thirty-nine; that said suit, so pending in said supreme court of the State of New York, was noticed for trial on or about the eleventh day of November, eighteen hundred and thirty-nine; that previous to said 200 last mentioned day the defendant in said *suit at law (the complainant in this cause) filed his bill of complaint in the court of chancery in and for the said State of New York, against the said bank, plaintiff in the said suit at law, and Randall S. Rice, administrator of the estate of Nehemiah O. Sargeant, deceased, and obtained from said court of chancery in said State an injunction restraining the proceedings of said bank in the said suit, on the draft or check aforesaid, as well as the said Rice, administrator of said Sargeant.

And this deponent further saith, that he examined and read the said complainant's bill of complaint so filed in the court of chancery for the State of New York, and so far as the said bill related to the said Farmers' and Mechanics' Bank it was for the prevention of the said bank from the collecting the said check, and the same allegations in substance were made against the said bank in said bill as are made in the bill of complaint in this cause against this deponent and the said bank; that upon the said injunction so granted in the State of New York being served upon the attorney of the said bank, the said suit pending in said supreme court was continued; that immediately thereafter, or as soon as the said bank could do so, a full answer to the allegations in the bill of complaint filed in said court of chancery was prepared and verified by the affidavit of this deponent; that upon filing the answer of said bank, a motion was made before the Honorable Reuben H. Walworth, chancellor of the State of New York, for the dissolution of the injunction previously granted in said State.

And this deponent further saith, that the motion to dissolve the

Carroll v. The Farmers' and Mechanics' Bank.

said injunction came on to be heard before the chancellor of said State on the twenty-third day of April, now last past, whereupon an order was duly made, dissolving said injunction, as will more fully appear by reference to a copy of said order hereunto annexed.

And this deponent further saith, the said suit is still pending in the supreme court of the State of New York, on said check; that the defense set up by the defendant in said suit (the complainant in this cause) is, that the check or draft was purchased by the said bank after it became due, or that it was taken *in 201 payment of some previous indebtedness of said Nehemiah.

O. Sargeant to the said bank; all of which allegations and pretences were fully and explicitly denied in the answer of said bank to the bill of complaint, filed in the court of chancery for said State of New York.

And this deponent further saith, that he has visited the State of New York once as a witness in said cause, pending in said supreme court, and the trial was prevented by said injunction; that he has recently received notice that the said cause is noticed for trial on the first Monday of June next, and the attendance of this deponent is requested as a witness; and this deponent saith he is fully and particularly acquainted with all the facts relative to the purchasing or discounting said draft or check by said bank.

And this deponent further saith, that he has good reason to believe, and does believe, that unless the said bank is permitted to proceed in said suit at law in the State of New York, at the next term of said court, or unless the said complainant be compelled to give security in this court, the said bank will suffer irreparable injury.

And this deponent further saith, that it will be impossible to procure from New York such papers or copies of them, as have been necessarily forwarded there to defend said suits, as will be required to make a full and complete answer to this bill of complaint, in time to move for the dissolution of the injunction in this cause, before the day on which the said cause now pending in

Carroll v. The Farmers' and Mechanics' Bank.

said supreme court is noticed for trial. And further this deponent saith not.

JOHN A. WELLES.

Sworn to and subscribed before me, }
this 14th May, A. D. 1840.

HENRY H. BROWN,
Notary Public, W. C., Mich.

A copy of the order of the court of chancery of the State of New York, dissolving the injunction issued upon the bill
202 *filed in that State by the complainant, is attached to the affidavit.

H. N. Walker, in support of the motion.

1. Where an injunction is granted to stay proceedings at law, it is proper to make a motion, based on an affidavit, to dissolve or alter the terms of it. (*1 Newland's Prac.*, 226; *2 Madd. Prac.*, 224; *6 Vesey*, 109, 110; *2 Chan. Cas.*, 203; *2 Johns. Ch.*, 140.)

2. There is no doubt but the court has the power to grant an injunction against a person's proceeding in a foreign court. (*4 Bridg. Digest*, 323; *Eden on Inj.*, 144; *5 Vesey*, 27, 71; *5 Madd. Rep.*, 297, 309; *6 Madd. Rep.*, 16; *4 Bridg. Dig.*, 340.) But the court will not, as a matter of policy and courtesy, restrain the proceeding commenced in a sister State. (*2 Paige*, 403, 404; *4 Cranch R.*, 179; *7 Cranch R.*, 278; *2 Story's Eq.*, 186.)

3. The bill in this case is defective. The statute provides that a bond shall be given under certain circumstances, and money paid into court under others. The bill should state, then, what is the situation of the suit at law, so as to enable the chancellor or judge to determine what order to make. (*R. S.*, 374, 375.)

The general rule is, that if a declaration has been filed, the plaintiff at law will be permitted to proceed to execution. Hence the necessity of stating the precise situation of the suit. (*10 Vesey*, 450; *18 Vesey*, 488; *1 New. Chan.*, 216; *2 Madd. Prac.*, 220; *3 Paige*, 33.)

Carroll v. The Farmers' and Mechanics' Bank.

The bill has not the requisites of a bill of discovery, there being no averments that the answer is wanted as evidence in another court; which is necessary. (*Story's Eq. Pl.*, 422; *Mitford's Pl.*, 186; 2 *Story's Eq.*, 710; 2 *Johns. Ch.*, 547, 548; *Cooper's Eq. Pl.*, 191; 2 *Ves.*, 451.)

4. But, conceding the point that the bill is perfect and sufficient, the injunction was improperly issued until a bond was given, in accordance with the statute. (2 *R. S., N. Y.*, 188; *R. S., Mich.*, 374.) It will be observed that the two statutes are alike. (2 *Paige*, 395; 3 *Paige*, 33; 1 *Hoffm. Chan. Prac.*, 85.)

**T. Romeyn, contra.*

203

1. The affidavit of John A. Welles is inadmissible on this motion. There are but two ways of dissolving an injunction: upon answer, or on the bill. (2 *Johns. Ch.*, 202; 1 *Hoffman's Pr.*, 361; 1 *Edw.*, 24; *Eden on Inj.*, 65.)

2. The affidavit, if received, is insufficient. (6 *Paige*, 109; 1 *Paige*, 427.)

3. The affidavit of the defendant's counsel is a sufficient answer to the equity of the motion.

4. The complainant should have reasonable time to file the bond. The court can exercise a discretion in this matter. (1 *Paige*, 427; 2 *Johns. Ch.*, 202, 203, 227.)

THE CHANCELLOR. A preliminary question is made as to the reception of the affidavit of John A. Welles. So far as the affidavit shows that the injunction was irregularly issued, or that the officer allowing the injunction has been misled, and induced to grant an injunction contrary to law, the affidavit is admissible.

2. As to want of equity in the bill. The bill alleges that an answer from said John A. Welles is necessary for the enforcement and support of the complainant's rights in the premises.

The rule is that the complainant shall charge in his bill that the facts are known to the defendant and ought to be disclosed by him, and that the complainant is unable to prove them by

Carroll v. The Farmers' and Mechanics' Bank.

other testimony; and when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill that they are wanted for such purpose. (*Brown v. Swan*, 10 *Peters' R.*, 502.)

If this be substantially the true rule, of which there can be no doubt, the bill is insufficient to sustain the injunction to the full extent in which it was allowed.

The bill alleges various and complicated transactions, and this allegation would be equally true whether the discovery from

Welles was necessary, either in relation to original negotiation * with Sargeant, or in relation to the draft upon which a suit is pending. It is not stated that the discovery is necessary to aid the defense at law, or that they are unable to prove the subject matter of that defense by other testimony.

The statute (*R. S.*, sec. 91, p. 374) is positive and peremptory, that no injunction shall be granted to restrain proceedings at law, where a cause is at issue, without filing a bond in such sum as the officer allowing the injunction shall prescribe, etc.

The bill alleges, merely, that the Farmers' and Mechanics' Bank have commenced, and threaten to prosecute a suit upon a certain draft, mentioned in the bill, given by the complainant to N. O. Sargeant, now deceased, without alleging the court in which such suit is pending, or whether the suit is at issue or not.

It is urged that, as the statute is imperative upon the officer allowing the injunction, it is incumbent upon the complainant, in his bill, to show the state of the pleadings, and the court in which such suit is pending, in order to enable the officer to whom the bill may be presented for the allowance of the injunction to judge of the propriety of its allowance, and, if allowed, to prescribe the terms in accordance with the provisions of the statute. This ground I deem to be well taken. It has been repeatedly decided that courts of chancery will not sustain an injunction bill to restrain a suit or proceeding previously commenced in a court of a sister State or in any of the federal courts. (2 *Paige*, 404; 4 *Cranch*, 179.) For aught that appears, this suit may be pending

Carroll v. The Farmers' and Mechanics' Bank.

in one of the federal courts, or in the court of a sister State. It may be at issue, or even in judgment, in one of those courts. As the statute requires, peremptorily, certain things to be done where a cause is at issue, it seems necessarily to follow, that the party should, when he states that a suit is pending, show the condition of that suit, in order to enable the officer allowing the writ to judge of, and to direct the necessary conditions.

To establish a contrary rule would open the door for great abuses of the process of the court. But whether this omission may be technically termed an irregularity or not, when it is *brought to the knowledge of the court that the officer allowing the injunction has been misled by such omission, that the process of the court has been improperly abused, there can be no doubt of its duty to afford a prompt correction. The affidavit discloses the fact that the injunction allowed in this cause purports to restrain the proceedings of a cause not only at issue, but pending in the court of another State. So far, the affidavit may undoubtedly be received. This being apparent, there can be no room for doubt as to the duty of the court, so far to modify the injunction as to divest it of this anomaly.

In the case of *Mead v. Merritt*, 2 Paige, 404, the chancellor says: "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power, by process of injunction, of restraining proceedings which have been previously commenced in courts of another State. Not only comity but public policy forbids the exercise of such a power. If this court should sustain an injunction bill to restrain proceedings previously commenced in a sister State, the courts of that State might retaliate upon the complainant, who was defendant in the suit there. By this course of proceeding the courts of different States would indirectly be brought into collision with each other in regard to jurisdiction; and the rights of suitors might be lost sight of in a useless struggle for what might be considered the legitimate powers and rights of courts." He further says that these principles "may now be considered the settled law of

Carroll v. The Farmers' and Mechanics' Bank.

this country. The prompt correction of this error is called for by a decent regard for the reputation of the court, and of the judicial proceedings of the State; and it is also due to the rights of the parties. The injunction must be dissolved.

Injunction dissolved.

Beaubien v. Foupard.

Emily Beaubien and others v. Simon Poupard, Administrator, etc.

Administrator's sale, when should be adjourned. When the day appointed for an administrator's sale is rainy and inclement, and but few persons appear and bid, and the bids do not exceed half the value of the property, it is the duty of the administrator to adjourn the sale.

Administrator's sale: Administrator cannot bid. A party cannot become the purchaser, either directly or indirectly, at a sale made by himself as administrator. (a.)

Where the administrator procured his brother-in-law to become the purchaser, and immediately afterwards took a conveyance of the premises so purchased to himself, the court of chancery, on bill filed by the heirs, set aside the sale, ordered the deed delivered up to be canceled, and directed a re-sale.

The bill alleges, in substance, that Lambert Beaubien was in his lifetime seized in fee simple of a certain tract of land situated in the county of Wayne, described in the bill of complaint; that said Lambert died in the month of September, 1819, intestate, leaving Jean Bt. Beaubien, the father of the complainants, and thirteen other children his heirs at law; that said Jean Bt. Beaubien, the father of the complainants, as aforesaid, died in the month of December, 1828, intestate, whereby complainants became seized and possessed of the undivided one-fourteenth part of said tract of land; that on the fifth day of October, 1829, Cecil Beaubien, the widow of said Jean Bt. Beaubien and mother of the complainants, presented a petition to the judge of probate of Wayne county, praying that administration on the estate of said Jean Bt. might be granted to her; but before any action was had on said petition, the defendant also presented an application to

(a.) See this case approved and applied to persons acting in various representative capacities, in *Dwight v. Blackmar*, 2 Mich., 330; *People v. Township Board of Oversees*, 11 Mich., 228. And see *Walton v. Torrey*, *post*, 259; *Clute v. Baron*, 2 Mich., 192; *Ingerson v. Starkweather*, Wal. Ch., 346; *Ames v. Port Huron Log Driving and Booming Co.*, 11 Mich., 139; *Flint & Pere Marquette R. R. Co. v. Dewey*, 14 Mich., 477.

1A	206
2	206
11	206
26	166
30	301

Beaubien v. Poupard.

said judge for letters of administration on the estate of said Jean Bt. Beaubien; that April 23d, 1830, the said defendant, with the assent of said Cecil, was duly appointed administrator on the estate of said Jean Bt. Beaubien, and took upon himself that trust according to law; that an inventory of the estate was duly filed in the office of said judge of probate, by which it appeared that the real estate was appraised at \$800, and the personal estate at \$81.92; that on or about the 6th day of December, 1830, the

said defendant presented to said judge of probate a paper, 207 representing among other things, that *he believed the estate of said Jean Bt. was indebted in the sum of four hundred dollars, and that the said estate was insolvent, and prayed the appointment of commissioners to examine the claims of the several creditors of said estate, which prayer was granted, and the commissioners appointed; after executing the trust reposed in them they made their report, by which it appeared that all the claims allowed against said estate amounted only to the sum of \$110.26; that on the 17th day of October, 1831, the defendant, as administrator aforesaid, presented a further petition to said judge of probate, stating among other things that the personal estate of said Jean Bt. was insufficient to pay the debts due by said Jean Bt. at the time of his death, and the charges of administration, and praying to be licensed and empowered to sell so much of the real estate of which the said Jean Bt. died seized as might be sufficient to pay said debt and charges; that on the 7th day of November, 1831, the prayer of the said defendant, administrator as aforesaid, was granted, and license was granted to sell certain lots, specified, or so much thereof as might be necessary for the purposes aforesaid, said lots having been duly set off to complainants by the circuit court of said county, upon a partition of the said real estate of which the said Lambert Beaubien died seized; that on the 20th day of October, 1832, the said defendant, as administrator, having first given the bond, taken the oath, etc., required by law, did sell at public auction the one lot numbered 12, at which sale the same was struck off to

Beaubien v. Poupard.

one Louis Beaubien, the brother-in-law of said defendant, for the sum of \$150.

The bill charges, that although the said lot numbered 12 was at said sale struck off to said Louis, yet the said purchase by him was made pursuant to an understanding or arrangement entered into previous to said sale between said defendant and said Louis, and that said sale was to accrue to the benefit of said defendant.

The bill avers that on the 30th of November, 1832, the said defendant, in his capacity as administrator, aforesaid, did execute and deliver in due form of law to said Louis, a deed of *said lot numbered 12, and that on the same day the said 208 Louis and his wife, for the consideration of \$150, did quitclaim to said defendant said lot No. 12; and further, that December 3, 1832, the defendant did further cause both of said deeds to be duly recorded at his own cost and charges.

The bill further charges that the defendant further disregarded the rights and interests of the complainants, who were infants, by not offering for sale some one or more of the other lots he was authorized to make sale of, instead of said lot No. 12, the said lot being a water lot and not salable, while the others were eligibly situated and in demand, and would have sold for a comparatively much higher price.

That said lot No. 12 would have sold for a much greater sum, but for the fraudulent conduct of the defendant; in proof whereof the complainants aver that the said defendant concealed the time of sale from the guardian of the complainants, who had made arrangements to prevent a sacrifice of their interests, until the day of sale, although the said defendant promised to give said guardian timely notice thereof.

That after said lot No. 12 was advertised for sale, the said guardian applied to the defendant, and desired to be informed in due season of the day of sale, to which the defendant replied to said guardian, who was unlettered, and unable to read or write, that he could not state with precision the time of sale, although

Beaubien v. Poupard.

he well knew he had appointed a day for that purpose. That the guardian, on being advised by the defendant that the said sale was to take place forthwith, remonstrated with the defendant for his neglect in not giving her timely notice, etc., and urged the propriety of postponing the said sale; to which the defendant replied that said sale could not be postponed.

That there were but few bidders at said sale, and that the weather was inclement, notwithstanding which the said defendant refused to postpone said sale, and that said lot sold for about one-half its real value.

The bill further charges, that the information with regard to the day of sale was withheld from the guardian of the
209 complainants, *by the defendant, in order that he might promote his own interest; avers that the defendant owned a lot adjoining said lot No. 12, which would be greatly enhanced by obtaining said lot No. 12.

The bill further states that the defendant, before said sale, said that he would procure some person to bid in said lot for him, as he could not legally or lawfully purchase it himself. And the bill prays that the sale may be set aside and a re-sale ordered.

The answer admits that Lambert Beaubien was, in his lifetime, seized of the premises; that license was granted to sell the same by the judge of probate, and that lot No. 12 was sold October 20th, 1832, at public auction, by defendant, as administrator, and that the same was struck off to Louis Beaubien, the brother-in-law to said defendant, for the sum of \$150; states that said Louis Beaubien was the highest bidder, and that \$150 was the highest sum bidden therefor.

The answer further states that, among many other citizens whom defendant solicited and urged to attend said sale, with a view of making a beneficial sale for said estate, of said lot, he spoke to said Louis Beaubien to attend and bid for the same, and that defendant told the said Louis, if he bid on said lot, and it was knocked off to him, this defendant would take it from him, but defendant and the said Louis both distinctly understood that,

Beaubien v. Poupard.

if it was knocked down to said Louis, he was at full and perfect liberty to keep the same, at the price bid therefor; and that there was no agreement, or any public or private understanding by or between the said Louis and this defendant, as charged in said bill, that he, the said Louis, was purchasing the same for defendant; but the said defendant so spoke to the said Louis, to induce him to bid for the same, *and with the 210 sole view of making the lot sell for a fair value. Denies that the deed from defendant, as administrator, to Louis Beaubien, of said lot No. 12, and the deed from said Louis Beaubien and wife to defendant, were recorded on the same day, and the record of both deeds paid for by defendant; denies that defendant disregarded the rights and interests of the complainants, by not offering some one or more of the other lots, instead of lot No. 12. The answer further states that the defendant "does not now remember whether, on the day of sale, the said guardian, or any other person, desired a postponement of the sale;" denies that defendant ever told the said guardian that said sale could not be postponed; admits defendant owned the adjoining lot in the right of his wife; states that defendant does not remember that he ever stated, before the sale, that he would procure some person to bid in said lot as charged in the bill; denies all fraud, etc.

Whipple and Van Dyke, for complainants.

**B. F. H. Witherell*, for defendants.

216

*THE CHANCELLOR.—The several allegations in the 217 bill, upon which relief is sought, are sufficiently met by the answer, except so far as they relate to the sale of the lot in question.

The proceedings before the court of probate, and notice of the sale, etc., seem to have been regular and fair. It is alleged in the bill, and is not denied in the answer, that the administrator, before the sale, expressed a desire or intention to purchase the lot. It also appears that he requested Louis Beaubien to attend

Beaubien v. Poupard.

the sale; that Louis Beaubien told him that he had no money, to which Poupard replied, he would lend him the money or would take the lot; that the day of sale was rainy and inclement, and there were but one or two persons who bid on the lot besides Beaubien, who purchased it; and that the lot was agreed to be conveyed to Beaubien, and by him back to Poupard, on their return from the sale. The inference, I think, is strong that the sale was, in fact, to Beaubien, for the benefit of Poupard, although there does not appear to have been an express agreement to that effect. Else why the strong urgency that Beaubien, who confessedly had no money to pay for the lot, should attend the sale? Poupard, it seems, knew that Beaubien could not pay for the lot, and the offer to lend him money or take the lot off his hands, still leaving the option with Poupard to do either the one or the other, and the known fact that Beaubien was unable to buy himself, in effect secured the lot to Poupard, and it was so consummated immediately after the sale. The administrator, I think, erred, acting in the capacity he did, in not adjourning the sale, when the day was rainy and inclement, and there were but one or two bidders beside Beaubien. It may have been that the desire of Poupard to secure the lot had no influence upon this decision. But if a sale of this character should be sustained, it would open the door for frauds, and would certainly throw great temptations before trustees acting in this capacity. I am satisfied that

218 Louis Beaubien had no intention of aiding * Poupard in purchasing the lot improperly; but he purchased under the promise that Poupard would take it off his hands. It makes no difference by what means an administrator secures the benefit of a purchase at a sale made by himself; the rule is imperative that he cannot become a purchaser at all. (*12 Peters Rep.*, 25; *Hart v. Ten Eyck*, 2 Johns. Ch., 62.)

I see no reason to suppose that Poupard intended, in fact, to commit a fraud upon the rights of the heirs, but enough appears to show that he intended to secure the lot under the sale. To sustain this sale would, in effect, break down the salutary rules

Beaubien v. Poupard.

of law upon this subject, and expose the rights of minors to the adroit management of an interested trustee.

The sale must be set aside, and the deed to Beaubien, and from him to Poupard, canceled, and a re-sale ordered, according to the prayer in the bill.

•

 Bank of Michigan v. Williams.

Bank of Michigan v. John R. Williams.

Plea of former suit pending. A plea of a former suit pending in another court for the same cause of action must set forth the general character and objects of the former suit, and the relief prayed for. (a.)

Motion to open default: Affidavit of merits. On motion to open a default, the affidavit of merits should be made by the defendant himself, or, if made by counsel, a sufficient reason should be shown for its not being made by the party. (b.)

Hearing upon a plea. The plea was of a former suit pending. It alleged in very general terms that another suit was pending in the supreme court for the same cause of action, and seeking the like relief prayed by the bill in this cause.

Joy and Porter, for complainant.

The plea filed in this suit is in itself defective, radically. It does not exhibit any portion of the bill filed in the supreme court which can make it appear to this court that both bills were for the same identical matter; which ought to have been done. So much of the first bill should have been set up in the plea as would make it appear that the same matter was involved in both. (See *Story's Eq. Pl.*, 570; *Beames' Pleas in Equity*, 140.) In pleas of this sort, says Story, there are several matters essential to their validity. The pleas should set forth with certainty the commencement, *the general nature, character, objects and relief* prayed for in the former suit.

In a plea of former decree, etc., so much of the bill and answer must be set forth as will show that the same point was then in

(a.) As to the requisites of a plea in chancery in general, see *Schwarz v. Wendell*, post, 395; *Thomas v. Stone*, Wal. Ch., 117; *Albany City Bank v. Dorr*, Wal. Ch., 317; *Carroll v. Potter*, Wal. Ch., 355; *Parker v. Parker*, Wal. Ch., 457; *Emerson v. Atwater*, 7 Mich., 12.

(b.) An affidavit of merits must show what the merits are. *Thayer v. Swift*, Wal. Ch., 384. See *Stockton v. Williams*, post, 241.

Bank of Michigan v. Williams.

issue. (*Mitford*, 258; 14 *Johns. Rep.*, 501.) The plea must not set up the facts *historically*, but must set out the subject matter of the suit pending, with *sufficient averments*. (3 *Atkyns*, 589; 2 *Atkyns*, 603.)

*The above authorities are conclusive as to the validity 220 of this plea, and it cannot be allowed. Should the court, however, think differently, and if it shall think this plea well pleaded, it would only put us to an election which suit we would prosecute, even supposing both were now pending; or perhaps order the first suit to be dismissed with costs, which was actually done before this suit was commenced. (See *Cooper's Eq. Pl.*, 275; *Story's Eq. Pl.*, 570, 572; *Beames*, 151; *Mit. Pl.*, 321.)

H. T. Backus, for defendant.

THE CHANCELLOR.—The plea in this case alleges generally, that another suit is pending in the supreme court for the same cause and for the like relief. This is insufficient. The plea should set forth the general character and objects of the former suit, and the relief prayed. (*Story's Eq. Pl.*, 570; 3 *Atk.*, 590.) This is not done here, and the plea must be overruled as insufficient.

An order, *pro confesso*, was entered October 27, and *H. T. Backus*, solicitor for defendant, filed an affidavit November 5, and moved to set aside the order, *pro confesso*.

He states in his affidavit, that in the order adjudging the plea to be insufficient, defendant was allowed to file an answer; that he supposed he had forty days within which to file his answer, and so advised the defendant; that, "as he believes, the said defendant has to said bill of complaint a good defense to a part at least of the amount claimed therein, by way of offset," and that he had been unable to prepare the answer, etc.

The chancellor denied the motion on the ground that the affidavit was made by the solicitor, and no reason was shown why it was not made by the party defendant himself.

Bates v. Garrison.

George C. Bates v. John D. Garrison.

Amending decree. The court of chancery has the power to direct the alteration or correction of a decree after it has been entered, either upon motion or petition, where there is evidently a mistake or clerical error. (α.)

This was a motion to correct the record, by amending the decree entered at the term previous.

The motion was founded upon an affidavit which stated that the suit in which the decree was entered was for the foreclosure of a mortgage; that the mortgage was given for the purchase money, and that that fact was stated in the bill; that the decree was by mistake entered for a sale of the mortgaged premises, in default of payment, etc., in *two years* and three months from the time of filing the bill, instead of *one year* and three months.

A. D. Fraser, in support of motion, cited *Seaton's Forms*, 275; *1 Hoff. Ch. Pr.*, 559.

THE CHANCELLOR.—This court unquestionably has the power to direct the alteration or correction of a decree after it has been entered, either upon motion or petition, where there is evidently a mistake or clerical error. In this case there was evidently a mistake or error in the decree for the sale of the mortgaged premises in two years and three months, when the party was entitled to take his decree for a sale in one year and three months from the time of filing the bill.

The register is, therefore, directed to make the proper correction or alteration.

And the alteration having been made by the register, the chancellor put his initials to the same.

(α.) See *Jerome v. Seymour*, Wal. Ch., 359. And as to the power of a court to amend its judgments in general, see *Emory v. Whitwell*, 6 Mich., 474.

Mason and Pritchette v. The Detroit City Bank.

Mason and Pritchette v. The Detroit City Bank and others.

Amendments to answer, how made. Where leave is given to amend an answer, a new answer, with the amendments added, must be made, filed, and copy served, or the original answer withdrawn by leave of the court, and the amendments added; or the amendments must refer to the portions of the answer on file, intended to be amended, and specifying their nature and application.

Amendments in the form of affidavits, without referring to the answer, are irregular, and a motion to dissolve an injunction will not be heard upon them.

This was a motion to dissolve an injunction on bill and answer.

The defendants at a former term had obtained leave to amend their answer. The papers on file, claimed by the defendants to be amendments, were drawn in the form of affidavits, and do not purport, either in the body or indorsement of them, to be amendments to the answer on file.

The complainants object to hearing the motion to dissolve the injunction, on the ground that no amendment to the answer has been filed or served.

T. Romeyn, for complainants.

The defendants, Howard and the bank, had leave to amend their answer, by having *the answer of the bank sworn to, and its seal verified*.

Without adverting to the *substance* of the affidavits filed as amendments to the answer of the bank, the complainants insist that these amendments are *not legally and formally* before the court, and that they have not been duly served upon the complainants.

The amendments do not refer to the pleadings *on file*.

They should have been added to or incorporated with them in some way or other.

A new answer should have been drawn, and the amendments

Mason and Pritchette v. The Detroit City Bank.

made a part of it; and a copy of the *whole* should have been served on the complainants.

The first answer was a *nullity*, for all purposes of a motion to dissolve the injunction. This is admitted; of course, there
223 *was no necessity for excepting to it to prevent such a motion. When it was perfected by being properly authenticated, then the right to except became available. But after this no copy was served.

The affidavits of Harris and Brown were served, but with no notice that they were intended as amendments to the answer; consequently the complainants have not had an opportunity of excepting to the amended answer.

Even if the first position of the complainants be incorrect, still it is evident that they have a right in some way or other to their exceptions, and that this is lost if the motion to dissolve is now heard.

If the court should not deem it necessary that the defendant should prepare a new answer, still it is beyond question that the amendments should *refer to the answer on file*. (See 1 *Hoffm. Pr.*, 240, 290, 292.)

The amendments should have been made in one of three ways, viz:

1st. A new answer should have been drawn, the amendments added, and the whole served and filed; or

2d. The old answer should have been taken from the files by leave of the court, the amendments added, and properly served on the complainants; or

3d. The amendments should have been drawn, *referring to the answer on file*, and a copy should have been served, specifying their nature and application.

The papers now produced are mere general affidavits. *They do not purport to be amendments*. This practice is irregular and mischievous. They do not purport to be amendments to an answer. They do not refer to the *answer as on file*, and if false, no *perjury* can be assigned on them.

Mason and Pritchette v. The Detroit City Bank.

J. M. Howard, for defendants.

THE CHANCELLOR.—The first question presented is whether there has been such an amendment made to the answer as would compel the complainants to regard the answer as filed, and to except, or reply to it.

*The defendants, Howard and the Detroit city bank, 224 had leave to amend their answer. The papers purporting to be an amendment are in the form of affidavits, and are so indorsed.

The amendments should have been added to or incorporated with the answer in some way.

A new answer should have been made, the amendments added, served and filed ; or

The original answer should have been withdrawn by leave of the court, and the amendments added and served on the complainants ; or

The amendments should have been drawn, referring to the portions of the answer on file intended to be amended, and specifying their nature and application.

The papers filed are merely general affidavits, and do not purport to be amendments. .

The motion is therefore premature, and cannot now be heard.

Carroll v. Van Rensselaer.

Charles H. Carroll and others v. Robert Van Rensselaer and others.

..action.
1h225
113 459

The vendor of real estate has an equitable lien upon the same for the purchase money, where there is no security for its payment taken. (a.)

The bill in this case was filed December 9, 1839, and stated that November 8, 1836, complainants were seized and possessed, in their own right in fee simple, of certain lands and premises situated in the county of Lenawee, in the State of Michigan; that they sold the same to Peter Stuyvesant, of the city of New York, for the sum of \$12,284.00, and executed and delivered a deed therefor in due form of law; that \$5,174.54 was paid on the execution and delivery of the deed, and at the same time Stuyvesant delivered to complainant, Charles H. Carroll, a bond, executed by John Catlin, bearing date September 2, 1835, for the sum of \$7,197.10, payable September 22, 1838, bearing interest at six per cent, payable semi-annually, which bond was assigned and guaranteed by Stuyvesant, with the understanding and agreement that, if the money secured by the bond should be paid to Charles H. Carroll, the same should be applied in liquidation of the balance of said purchase money; that July 30, 1839, Stuyvesant conveyed the lands and premises to Robert Van Rensselaer. The bill charges Van Rensselaer with full notice of all the facts; and also charges the conveyance from Stuyvesant to Van Rensselaer to be fraudulent, and that Stuyvesant and Catlin are insolvent, and that there yet remains due of the purchase money about the sum of \$8,222, for which a lien is claimed.

An answer was put in by Van Rensselaer, which was subsequently withdrawn and the bill taken as confessed.

(a.) See *Payne v. Atterbury*, post, 414; *Palmer et al.*, appellants, 1 Doug. Mich., 422; *Sears v. Smith*, 2 Mich., 243; *Mowrey v. Vandling*, 9 Mich., 39; *Converse v. Blumrich*, 14 Mich., 109.

Carroll v. Van Rensselaer.

The complainants asked a decree that the amount of the purchase money remaining due from Stuyvesant to complainants shall be a lien on the premises, and that defendants redeem the premises by the payment of the sum remaining due within a certain time, or, in default thereof, that all and singular the premises be sold, etc.

* *A. D. Fraser*, for complainants.

226

The proposition that the vendor of real property, who has not taken separate security for the purchase money, has a lien for it on the land as against the vendee and his heirs, is too well settled in this country to admit of discussion, subject indeed to be defeated by alienation to a *bona fide* purchaser without notice. (*Brown v. Gilman*, 4 *Wheat.*, 255, and notes; *Bayley v. Greenleaf*, 7 *Wheat.*, 46.) This doctrine is fully examined by Lord Eldon in the case of *Mackreth v. Symmons*, 15 *Ves.*, 329. And the result of his investigation is

1st. That generally speaking there is a lien.

2d. That in those general cases in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid. He adds, these two points seem to be clearly settled. Chancellor Kent, also, in *Garson v. Green*, 1 *Johns. Ch.*, 303, recognizes this doctrine. Reference is also made to the following cases: *Hughes v. Kearney*, 1 *Sch. and Lef.*, 132; *Nairn v. Prowse*, 6 *Ves.*, 752; *Gilman v. Brown*, 1 *Mason*, 191.

THE CHANCELLOR.—The vendor of real estate has unquestionably an equitable lien upon the same for the purchase money, where there is no security for its payment taken. The complainants are entitled to take their decree in the form suggested.

Clark v. Davis.

James B. Clark and another v. Phineas Davis.

1h 227
44 206
55 53
56 297
58 484

Creditor's bill, what to state. A creditor's bill must contain the averments required by the 109th rule (rule 102 of 1858), and those averments must be sworn to.

Creditor's bill with double aspect. A bill may be filed both to reach mere equitable interests and in aid of execution at law; and such a bill is not multifarious.

Creditor's bill, waiver of right to file. The right to file a creditor's bill having once attached by the return of an execution unsatisfied, the party does not lose his right to file the same by the issuing of a new execution.

8 --
1h 327
13 268

General demurrer. A general demurrer for want of equity cannot be sustained, unless the court is satisfied that no discovery or proof properly called for by or founded on the allegation of the bill can make the subject matter of the suit a proper case for equitable cognizance. (a.)

Demurrer ore tenus. Where a new cause of demurrer is assigned *ore tenus*, the cause must be co-extensive with the demurrer.

Motion to dissolve an injunction.

The bill filed in this case is framed with a double aspect. It sets up the return of an execution unsatisfied, and the issuing of another execution. It seeks to reach the equitable interests of the defendant, and also to aid the second execution. The jurat is special, and as follows:

"*State of Michigan, County of Wayne, ss.*

"*Ezra C. Seaman*, solicitor for the complainants, being duly sworn, says that he drew the draft of the foregoing bill of complaint, and knows the contents thereof; that the complainants are not citizens of the State of Michigan, but of the State of New York, as stated in the bill, as this deponent verily believes; that this deponent has examined the records, papers and proceedings in the suit stated in the bill of the complainants, against the defendant, Phineas Davis, in the office of the clerk of the circuit

(a.) See *Thayer v. Lane*, *post*, 247; *Hawkins v. Clermont*, 15 Mich., 511; *Williams v. Hubbard*, Wal. Ch., 28; *Edwards v. Hulburt*, Wal. Ch., 54; *Burpee v. Smith*, Wal. Ch., 327.

Clark v. Davis.

court for said county of Wayne, and verily believes that a judgment was obtained in said suit, and that an execution was issued thereon and returned unsatisfied, as stated in said bill. And this deponent further says that he, as attorney for the plaintiffs, procured a new execution on said judgment to be issued and delivered to the sheriff, as stated in the bill, on the 28th day of July instant; and that this bill is *not exhibited by 228 collusion with said Phineas Davis, or for the purpose of protecting the property and effects of said Davis, or any part thereof, against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the money due on the aforesaid judgment, the whole amount of which deponent believes to be unpaid, and the judgment in full force." Sworn, etc.

Upon this the usual injunction was allowed.

T. Romeyn, in support of the motion.

The jurat is defective.

1. No sufficient cause is shown for its not being sworn to by the complainants.
2. The *substance* of the jurat is not according to the rule of the court. (*Rule 14.*) (*b.*)
3. The averments required by the 109th rule are not sworn to at all. These averments are material, and without them the bill cannot be sustained. (*McElwain v. Willis, 3 Paige, 505.*)

(*b.*) The following are copies of rules 14 and 109 here referred to:

14. In bills, answers and petitions, which are to be verified by the oath of the party, the several matters stated, charged, averred, admitted or denied, shall be stated positively, or upon information or belief only, according to the fact. The oath administered to the party shall be, in substance, that he has read the bill, answer or petition, or has heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and, as to those matters, he believes it to be true; and the substance of the oath shall be stated in the jurat.

109. Where a creditor, by judgment or decree, files a bill in this court against his debtor to obtain satisfaction out of the equitable interests, things in action, or other property of the latter, after the return of an execution unsatisfied, he shall state in

 Clark v. Davis.

E. C. Seaman, for complainants.

The affidavit does contain and establish, by the oath of the solicitor in the first place, an excuse why it was not made by one of the plaintiffs; and, secondly, it establishes all the material allegations of the bill required by the revised statutes to give the court jurisdiction (*R. S.*, 365, *secs.* 25, 26), and substantially complies with the rules of court.

It is averred in the bill that the plaintiffs *are informed and believe* that the defendant has equitable interests, choses in action, notes, accounts, judgments, etc., amounting to over one hundred dollars, etc., and praying a discovery.

This is, in effect, but a formal averment, calling for *discovery*. The affidavit shows that the plaintiffs are citizens of New York, and most likely they have no information whatever as to the equitable effects and choses in action of Davis. At all events, their solicitor here does not know, and cannot know what *information* the plaintiffs have on the subject, nor what their *belief* is

229 on the subject; and, therefore, could not swear *that the plaintiffs were informed and believed the matters stated in the bill. The solicitor might swear that he had been informed and believed himself that Davis has notes, etc., but he could not swear that the plaintiffs had been *informed and believed*. The form of affidavit in the rules does not, therefore, apply to cases of bills where an agent or solicitor swears to the subject matter.

Rule 14 does not apply to cases of bills, etc., sworn to by an agent, for he cannot swear to what the plaintiff *believes*, and sel-

such bill, either positively, or according to his belief, the true sum actually and equitably due on such judgment or decree, over and above all just claims of the defendant, by way of offset or otherwise. He shall also state that he knows, or has reason to believe, the defendant has equitable interests, things in action, or other property, of the value of one hundred dollars or more, exclusive of all prior claims thereon, which the complainant has been unable to discover and reach by execution on such judgment or decree. The bill shall likewise contain an allegation that the same is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor against the claims of other creditors; but for the sole purpose of compelling payment and satisfaction of the complainant's own debt.

Clark v. Davis.

dom can swear to what the plaintiff has been informed. The statute and rule 110 (c) has been complied with, by swearing to all the material parts of the bill, and all the chancellor deemed necessary when the injunction was granted.

The rules of court, requiring bills to be sworn to, apply to only so much of the bill as seeks to reach choses in action, etc., on the ground of execution returned unsatisfied. The injunction to restrain the party from disposing of real and personal property, which might be levied on under execution, was properly granted, according to the English rules, on a separate affidavit, merely setting forth the recovery of judgment and suing out execution.

THE CHANCELLOR.—The jurat is insufficient. It is special, and none of the averments required by the 109th rule are sworn to at all. These averments are material; without them the injunction cannot be sustained. (See *McElwain v. Willis*, 3 Paige R., 505.) The injunction must be dissolved.

Injunction dissolved.

The complainant having obtained leave to file a new affidavit, the following affidavit was filed as an amendment:

“Wayne County, ss.

*“Ezra C. Seaman, being duly sworn, deposes and says, that the complainants in this cause are not citizens or residents of the State of Michigan; that they were both absent from the State of Michigan when the bill of complaint was filed in this *cause, and are still absent from this State as 230 deponent verily believes; that this deponent is the attorney and agent of said complainants for the purpose of collecting the judgment set forth in the bill of complaint in this case; that this deponent has information in relation to the recovery of the judgment set forth in the said bill, and issuing of the several executions thereon, and the return of such executions; and from such*

(c.) This rule provided for the verification of bills by agent or attorney when the complainant resided out of the State.

Clark v. Davis.

information deponent verily believes all the matters set forth in said bill, in relation to the recovery of said judgment, issuing the several executions thereon, and the return of such executions, to be true, as therein stated, and that the whole amount of said judgment is due and unpaid. Deponent has also information in relation to the property, effects, choses in action and equitable interests and rights of said Davis, and from such information deponent verily believes that said Davis had at the time of filing the bill in this cause, and the commencement of this suit, either in possession or held in trust for him (not including such trusts as have been created by and due person or persons other than said Davis himself), equitable interests, things in action, or other property of the value of upwards of one hundred dollars, exclusive of all prior just claims than as is set forth in said bill. Deponent further says that no answer has been put in in this cause, and further saith not."

Subscribed, sworn, etc.

The defendant then demurred generally, and insisted that the bill was not sustainable either as a *creditor's* bill or as a bill in *aid* of the execution.

The cause was heard upon the demurrer.

T. Romeyn, in support of the demurrer.

As a creditor's bill it is *insufficiently* verified.

Such bills must be verified by *oath*. (*Rule 110.*)

The present bill is not verified by oath according to the rules.

First. The jurat should be general, extending to the *whole* bill, and according to the form prescribed by the 14th rule.

231 **Second.* Even if the jurat may be special, and extend to but a part of the bill, the present jurat does not cover the material statements in the bill.

The last affidavit must be considered as superseding the former. The rule to amend was for "leave to file a *new* affidavit," not a supplemental affidavit. The new affidavit does not allege that

Clark v. Davis.

the bill was not filed by *collusion, etc.*, in the manner prescribed by the 109th rule. These allegations are material, and the want of them renders the bill demurrable. (*McElwain v. Willis, 3 Paige, 505.*)

Again. If both affidavits are to be considered in force and subsisting, still neither of them covers the averments in the 8th folio, that the defendant has equitable interests, etc., property held in trust for him, etc. This is a part of the statement of the bill, and must be sworn to. (*Rule 110.*)

The bill is not sustainable as a creditor's bill, because it shows an execution outstanding not returned, and not returnable at the time when it was filed, and to the levy of which property sufficient to satisfy the debt was subject. (*See 3 Paige, 311.*)

The bill is not sustainable as a bill in aid of an execution on account of its vagueness and uncertainty.

It does not state that the defendant was seized or possessed of any property, but merely states the belief of the complainants. (*Mountford v. Taylor, 6 Vesey, 792.*)

There is no description of the property, nor of the incumbrances on it. The whole bill is vague, uncertain and informal. (*See McElwain v. Willis, 9 Wend., 561, 567-8-9.*)

The bill is *multifarious*, and therefore, demurrable. (*Mitford Ch. Pl., 118, and note.*) The demurrer goes to the whole bill. (*Boyd v. Hoyt, 5 Paige, 79.*)

Even were the general demurrer decided to be inapplicable, the objections now taken are good causes of demurrer, *ore tenus*. (*Story's Eq. Pl., 365.*)

*E. C. Seaman, for complainants.

232

The want or defect of averment required by the 189th rule of court in New York, which is our 109th rule, has been held a defect of form only, and may be supplied by amendment. (*McElwain v. Willis, 3 Paige, 506, 507.*)

The defect in this case, if it was a defect at all, was in the affidavit only, and not in the bill, and according to the case of

Clark v. Davis.

McEhwan v. Wilks, was a defect of form only, at most, and has been cured by the amendment or new affidavit filed, call it by what name you choose.

Such a defect cannot be taken advantage of on general demurrer, but must be taken advantage of either on motion or on special demurrer. A general demurrer is good only when it appears on the face of the bill that the complainant has no equity. (*Story's Eq. Pl.*, 557, sec. 455.) Demurrers for all causes, except a want of equity, must be special. (*Mitford's Pl.*, 213, 214; *Story's Eq. Pl.*, 357, sec. 455, 457.)

The amendments to the bill, being mere matters of form, and not of substance, are considered as forming part of the original bill, and refer to the time of filing the bill. (*Hurd et. al. v. Everett*, 1 Paige, 124; *Mitford's Pl.*, 55, note, 330; *Knight v. Matthews*, 1 Mad. Rep., 307; *Story's Eq. Pl.*, 689; *Cooper's Eq.*, 340.)

The original affidavit to the bill (which defendant's counsel claims is defective, and not cured even by the amendments and new affidavit) being required by the 110th rule of this court, either is or is not a necessary part of the bill itself; if not, then it is a mere preliminary matter, and the demurrer being to the bill only, and not to this preliminary affidavit, cannot reach it, even if it is defective or totally wanting. If it is a necessary part of the bill itself, then the amended affidavit cures the defect, by coming directly within the terms of the general order to amend, and is good without the special clause of which the defendant's counsel complains.

If the affidavit to the bill is not a necessary part of the bill itself, then the question arises, is it necessary at all, unless

233 for *the purpose of obtaining an injunction or receiver before answer. That is the only object of it; the proceedings would be good without any affidavit at all. But if this be not the true construction, the worst construction that can be put upon it is that it is a mere irregularity of practice. If so, the only remedy the defendant could have would be to move to dis-

Clark v. Davis.

miss the bill, and this should have been done before appearing in the cause, or at the first opportunity after being informed of the irregularity.

By appearing and putting in a general demurrer, and allowing more than six months and a term of the court to elapse without objection, it is now too late. The party has waived his right to raise any such objection. It has been expressly decided by Chancellor Kent, in two cases, that irregularities of practice are waived, if the objection is not made in a proper manner at the first opportunity. (*Skinner v. Dayton*, 5 Johns. Ch., 192; 2 Johns. Ch., 226.)

The demurrer is general, and if too broad must be overruled. If a demurrer is bad in part, it must be wholly overruled, as it covers too much. (*Janes v. Frost*, 1 Jacobs, 467; *Mitford's Pl.*, 214.) It is here attempted to combine together several imaginary causes of special demurrer, in order to make one good cause of general demurrer—a strange mode of argument.

A bill may be filed as well in aid of an execution at law, to discover property that may be subjected to execution, as to reach mere equitable interests and choses in action. (*Cuyler v. Moreland*, 6 Paige, 274; *Leroy v. Rogers*, 3 Paige, 236.)

A bill may be filed for the sole purpose of aiding execution at law, that is, for the discovery of property, that it may be levied on by the execution; in such case the execution must be out, and in the sheriff's hands ready to be levied on the property when the discovery is made. (*Leroy v. Rogers*, 3 Paige, 234 to 237; *Angel v. Draper*, 1 Vernon, 398, 399; 6 Ves., jun., 788.)

*And on a general bill without any special allegations, 234 defendant will be compelled to discover all his property, including lands as well as personal estate, lying out of the jurisdiction of the court. (3 Paige, 235.)

Taking out a new execution will not prevent the plaintiff from filing a creditor's bill to reach equitable interests, as long as the judgment is not paid, and property sufficient to satisfy it has not been levied on. (*Cuyler v. Moreland*, 6 Paige, 274.)

Clark v. Davis.

Bringing suit on judgment, after return of an execution unsatisfied, and obtaining a new judgment, will not prevent a creditor from filing a creditor's bill on the original judgment, as the original judgment is not thereby extinguished. (*Bates v. Lyons*, 7 *Paige*, 86.)

After judgment and an execution returned unsatisfied, if the judgment is assigned, the assignee may file a creditor's bill in his own name, and without taking out a new execution. (*Gleason v. Gage*, 7 *Paige*, 121 to 124.)

The demurrer must be overruled, and if so, a receiver will be appointed, of course. (See 2 *Paige*, 343, 346; 7 *Paige*, 58, where Chancellor Walworth says complainant may move for an injunction or receiver.)

If defendant is allowed to answer, it should be on the payment of costs. (7 *Paige*, 86, 124.)

In all cases, on overruling a demurrer, leave to answer should be given only on the condition of paying costs and answering in a short period; such is the invariable rule at law. (See, also, 1 *Hoff. Ch. Pr.*, 215.)

THE CHANCELLOR.—The affidavit filed under the leave of the court must be considered as cumulative, and does not supersede the first. They are both annexed to the bill, and stand of record. Treating the two affidavits as of force and subsisting, all the allegations of the bill, which are required by the rules and practice of the court, in order to entitle the party to file and prosecute a creditor's bill in this court, are sworn to. This is sufficient upon a general demurrer. The existence of the judgment, the issuing

and return of the execution unsatisfied, and the allegation
 235 that the defendant has equitable interests *to the value
 of one hundred dollars and more, are sufficiently shown,
 and are sworn to. The bill is not multifarious. A bill may be
 filed as well to reach mere equitable interests, as in aid of an execution at law. (*Cuyler v. Moreland*, 6 *Paige*, 274.) The right to
 file a creditor's bill having once attached by the return of the

Clark v. Davis.

execution unsatisfied, the party is not prevented from commencing proceedings in chancery by the issuing of a new execution. (6 Paige, 274.) It is not now necessary to decide whether the allegations in the bill are sufficiently specific to entitle the complainant to the relief he seeks in aid of his execution. The bill, as a creditor's bill merely, is sufficient upon this question. A general demurrer for want of equity cannot be sustained, unless the court is satisfied that no discovery or proof properly called for by or founded on the allegations in the bill, can make the subject matter of the suit a proper case for equitable cognizance. (*Bleeker v. Bingham*, 3 Paige, 246.)

Where a new cause of demurrer is assigned, *ore tenus*, the cause must be co-extensive with the demurrer.

Demurrer overruled, and reference for the appointment of a receiver.

Pratt v. Campbell.

John A. Pratt and another v. Edward R. Campbell and others.

Agency disavowed. Where parties assumed to be agents for a bank in settling a demand, and procured from the debtor an assignment of property in compromise, and the bank denied their authority to make the compromise, whereupon the debtor made a second assignment of the property to complainants, *held*, that complainants might maintain a bill in equity to restrain the assumed agents from collecting and disposing of the property. (a.)

Motion to dissolve injunction for want of equity.

The bill states that in December, 1838, Thomas Emerson was largely indebted to the Bank of Windsor, and a judgment had been recovered against him by the bank, to the amount of \$59,000, upon which the latter threatened to issue a *ca. sa.*; that E. R. Campbell and Rufus Emerson proposed a compromise, in the name of the bank; that they represented themselves as the agents and attorneys of the bank, with full power to bind their principal; during the negotiation they conferred repeatedly with the officers of the bank, and Thomas Emerson refused to treat with them in any other capacity; that on this understanding a compromise was made; that previously to this, the bank had commenced various trustee or attachment suits against the property and credits of Thomas Emerson, in the States of Ohio, Indiana and Michigan; that by the terms of the compromise, Thomas Emerson was to pay \$20,000, in approved securities, in payment and satisfaction of the bank's claim against him; these securities were to be assigned to E. R. Campbell and Rufus Emerson, and as collateral security for the payment of the assigned securities, other obligations were to be transferred to said Campbell and Emerson; that Royal H. Waller, as agent and attorney of all the parties, was to

(a.) A person cannot ratify in part the contract of one who has assumed to act as his agent, and repudiate it in other particulars. *Widner v. Olmstead*, 14 Mich., 124; *Peninsular Bank v. Hanmer*, Ib., 208; *Hutchins v. Ladd*, 16 Mich., 493.

Pratt v. Campbell.

be sent to Michigan to change and secure the obligations which had been assigned by T. Emerson, in payment and satisfaction of the bank's *claim against him, and which were 237 principally due and owing from residents of this State; that the bank authorized him to act for them in the premises, and by virtue of their power of attorney he discontinued the attachment suits, changed the form of the securities assigned in payment, took some notes payable to Campbell and Emerson, and took, also, an assignment to them of some bonds and mortgages; after doing this, he returned to Vermont. The bank professed to be dissatisfied, and demanded and received additional securities as collateral to those assigned in payment of T. Emerson's debt, and which had been thus changed by said R. H. Waller; that after this, the bank, for the first time, repudiated the contract, denied the right of E. R. Campbell and Rufus Emerson to bind them in the premises, and without proffering a return of the securities, proceeded on their judgment against said Thomas Emerson, and issued execution thereon; that at the same time Campbell and Emerson took similar ground, and claimed all the above securities as their own individual property; that this claim was founded principally on the alterations of the articles, made by them fraudulently, after the first execution thereof; that after the perpetration of these alleged frauds, and the entire failure of the contract between Thomas Emerson and the bank, he assigned all the securities and all his claim against the bank and said Campbell and Emerson to the complainants, who had incurred heavy responsibilities for his benefit. The complainants aver the utter insolvency of Edward R. Campbell and Rufus Emerson; they aver that the notes, bonds, etc., are now in Detroit, and some of them in process of collection, and pray that said Campbell and Emerson may be compelled to deliver them to the complainants; that the attorneys who hold them may be restrained from giving them back to Campbell and Emerson, and from paying moneys already collected to the latter; that no more suits may be brought in behalf of Campbell and Emerson, and that the several debtors

Pratt v. Campbell.

may be decreed to pay and account to the complainants; and may be enjoined from paying Campbell and Emerson.

No injunction is asked to restrain the proceedings at law already commenced.

238 *Injunction granted, as prayed.

The defendants move to dissolve the injunction for want of equity in the bill.

D. Goodwin, in support of the motion.

1. The whole case is based on the assignment from Thomas Emerson to Emerson and Campbell, which is attempted to be varied as to its legal effect, by parol. (*1 Peters R.*, 1; *4 B. & C.*, 513.)

This cannot be done. It was executed with a full knowledge of the facts, and deliberately. Emerson intended to execute just such an instrument *at the time of its execution*, and the previous conversations and negotiations cannot be resorted to to control it; they are merged in it.

As to the insolvency, it is alleged to have existed at the time.

2. Upon the ground assumed by the complainants, there is no consideration for the agreement. Emerson owed the whole debt, and was *bound legally to suffer judgment and pay it*; and judgment being rendered, *to pay the whole amount*. If a false plea were interposed for delay, the court, if such were known to them to be the fact, would strike it out without ceremony, and the agreement to receive a less sum than the amount due would be no satisfaction or discharge, even if the lesser sum were paid; and the damages upon such a covenant would be merely nominal. (*Chitty on Con.*, 277; *17 Johns. R.*, 169; *5 East*, 252; *4 B. & C.*, 513; *1 Ib.*, 426.)

3. Thomas Emerson makes no complaint as to the assignment or the present disposition of the bonds, etc. It is not competent for his assignee to do so of his own motion; on the contrary, there appears an after consent on the part of Emerson.

Pratt v. Campbell.

T. Romeyn, contra.

THE CHANCELLOR.—The facts presented in this case are sufficient to retain the injunction, and entitle the complainants to an answer.

*After Campbell and Rufus Emerson had obtained an assignment and the possession of the property of Thomas Emerson, by assuming to act as the authorized agents and attorneys of the Bank of Windsor, the bank refused to perform the conditions on which the assignment was made, and denied the authority of Campbell and Emerson to act as the agents of the bank in the premises, and the bank, and Campbell and Emerson, who assumed to act as the agents of the bank, now refuse to return the property, and are proceeding to collect the demands, and use the property assigned by Thomas Emerson.

It also appears that subsequent to the disavowal of the authority of Campbell and Emerson by the bank to act as its agents in the premises, and denial of their authority to make the compromise, Thomas Emerson has assigned the property and demands to the complainants, who claim to be the legal and *bona fide* owners of the same.

The facts presented by the bill are sufficient to authorize the retaining of the injunction, and the motion to dissolve must be denied.

Motion denied.

Clark v. The Saginaw City Bank.

Clark & Tillinghast v. The Saginaw City Bank and Norman Little.

Plea and answer. A defendant may plead to one part of the bill, and answer to another part; but these defenses must clearly refer to separate and distinct parts of the bill.

When the answer and plea are to the same parts of the bill, the answer overrules the plea.

The bill in this case is filed for the collection of certain bills and drafts of the Saginaw City Bank, for a discovery, and the removal of Norman Little, the receiver heretofore appointed, and prays for the appointment of a new receiver, etc.

The defendants plead to all the discovery prayed in the bill, and to all the relief prayed, except as to the dividend to be received from the receiver, and answer to nearly all the matters charged in the bill.

The case was set down for argument on the plea, under the provision of rule 32.

E. C. Seaman, for complainants.

The answer overrules the plea. (*Mit. Pl.*, 319, 320; *Story's Eq. Pl.*, 505, 506.)

S. G. Watson, for defendants.

THE CHANCELLOR.—The defendants may plead to one part of the bill, and answer to another part; but these defenses must clearly refer to separate and distinct parts of the bill. If the defendants have answered to any part of the bill to which they have pleaded, the answer overrules the plea. (*Mit. Pl.*, 319, 320.)

The plea in this case extends to all the discovery, and nearly all the relief prayed. In fact, the plea and answer appear to apply to the same parts of, and each to nearly the whole bill; the answer consequently overrules the plea.

Plea overruled.

Stockton v. Williams.

Thomas B. W. Stockton and others v. Gardner D. Williams and others.

Setting aside default. A regular order to take the bill as confessed will not be set aside upon a simple affidavit of merits, although an excuse is given for the default.

1h 541
1w 76

In such case, the defendant must either produce the sworn answer which he proposes to put in, or must in his petition or affidavit state the nature of his defense, and his belief in the truth of the matters constituting such defense.

The bill in this case was taken, *pro confesso*, against all the defendants; defendant Williams moves to set aside the order, *pro confesso*, and for leave to answer, which motion is founded on the affidavits of defendant Williams and his solicitors. Williams, in his affidavit, states that he has fully and fairly stated his defense to his solicitors, and is advised by his said solicitors, and verily believes, that he has a good and substantial defense on the merits, to the complainant's bill of complaint, and that great injustice would be done if he should be precluded from putting in an answer, and thereby having an opportunity of contesting the validity of the claim set up by the complainants; that the property in controversy is of great value, etc.

Hunt and Watson, the solicitors for Williams, in their affidavits excuse the default, on the ground of a misapprehension of the practice, etc., and also state their belief that the defendant, Williams, has a defense on the merits, etc.

Hunt and Watson, in support of the motion.

Fraser and Romeyn, opposed the motion.

Before the court will open an order to take the bill, *pro confesso*, it will require that the answer proposed to be filed be exhibited. (*1 Hoff. Ch. Pr.*, 553; *Herne v. Ogilvie*, 11 Ves., 77.)

Stockton v. Williams.

The court will also require to be satisfied, both that the answer is material, and apparently full. (*Hoff. Ch. Pr.*, 553.)

The defendant should have stated the nature of his defense before making this motion. (*Lansing v. McPherson*, 3 *Johns. Ch.*, 424; *Hunt v. Wallis*, 6 *Paige*, 372.)

242 *THE CHANCELLOR.—A regular order to take the bill as confessed will not be set aside upon a simple affidavit of merits, although an excuse is given for the default. In such cases, the defendant must either produce the sworn answer which he proposes to put in, so that the court may see that he has merits, or must, in his petition or affidavit, state the nature of his defense, and his belief in the truth of the matters constituting such defense, so far at least as to enable the court to see that injustice will probably be done if the order to take the bill as confessed is permitted to stand. (*Hunt v. Wallis*, 6 *Paige*, 371; *Lansing v. McPherson*, 3 *Johns. Ch.*, 424.)

The defendant may have twenty days to exhibit his answer, under the circumstances of this case.

The answer having been exhibited within the twenty days, the chancellor opened the default, and permitted the same to be filed on payment of costs.

Atwater v. Kinman.

**Clinton E. Atwater and others v. James K. Kinman and
others.**

Oath to bill. Where no preliminary order is required it is not necessary that bills should be sworn to, although the answer under oath is not waived.

Irregular foreclosure, waiver of. Where, in a foreclosure of a mortgage, by advertisement under the statute, a mistake occurs, which renders the proceedings irregular and voidable, the mortgagee has a right to waive those proceedings, and commence *de novo*, either by advertisement under the statute, or by availing himself of the right he had in the first instance to seek his remedy in this court.

IN 948
81 208
1h 948
86 400

This was a bill to foreclose a mortgage given by Carl Brockhousen and wife to Clinton E. Atwater and Henry A. Delavan, the complainants, to secure the payment of four hundred dollars. The bill is in the usual form for a foreclosure, and does not waive the necessity of the defendants answering on oath. It further states that, from the examination of the records, it appears that James K. Kinman had purchased the said mortgaged premises for the sum of twelve hundred dollars, and received a deed for the same, about March 28, 1839, which deed was on record.

The bill further states that complainants had foreclosed their mortgage by advertisement under the statute, and that the mortgaged premises were sold under such advertisement, April 9, 1839, at the court house in the county of Hillsdale, where the mortgaged premises were situated, by the sheriff of said county, and bid in by Salem T. King, agent and attorney for complainants, for the sum of four hundred and forty-seven dollars and sixty-three cents; that the usual certificate, affidavits of publication, etc., were duly recorded.

That complainants had subsequently ascertained that the *sale was irregular, inasmuch as both lots were sold 244 together, instead of being sold separately, pursuant to the provisions of the statute.

Atwater v. Kinman.

The bill further states that Kinman had declared the sale to be irregular, and that complainants would be compelled to foreclose again, and that he had given complainants to understand that he should disregard the sale entirely, and that complainants are apprehensive that if the sale should be considered voidable only, and liable to be made good by the acquiescence of the parties, yet, that the defendants would refuse to redeem the said premises, and that they would contest any proceedings at law to obtain possession of said premises.

The defendants demur.

Lee and *Pratt*, in support of the demurrer.

1. Complainants' bill is not sworn to by complainants, their agent, attorney, or solicitor, nor the answer of the defendants on oath waived; the demurrer, therefore, is well taken. (*Lansing v. Pine, 4 Paige, 639.*)

2. If the bill filed was verified by the oath of complainants or any other person, the defendants were not bound to look beyond the copy of the bill served on their solicitor. (*Lansing v. Pine, 4 Paige, 639.*)

3. In the first place, the complainants had their election to foreclose their mortgage at law or in equity, and, having made their election and foreclosed at law, sold and bid in the premises, they cannot now foreclose again in this court.

4. The complainants have not made such a case, upon the face of their bill, as entitles them to any relief in this court. The complainants do not ask to have the foreclosure at law set aside at their own expense; nor does it appear that the complainants have ever asked the defendants to waive, or in any way release, any error in the proceeding at law. Nor does it appear

245 but that the defendants would have been willing, at *any time, to have released any error if desired or requested. Nor does it appear but that the defendants intend, in good faith, to pay up the mortgage and redeem the premises before the time for the redemption expires.

Atwater v. Kinman.

5. If there was an error in the proceeding to foreclose at law it does not render the foreclosure void; at most the proceedings are only voidable; and, therefore, until the defendants take some steps to avoid the validity of the foreclosure and sale, the complainants cannot, in equity, ask permission of this court to avoid their own proceedings. A foreclosure at law is in the nature of a judicial proceeding.

A *bona fide* purchaser under a judicial or other sale at law is always protected where there is jurisdiction. And this question is fully settled in the case of the *American Insurance Co. v. Fisk*, 1 Paige, 90; and in which case the bill was dismissed by the chancellor on that ground.

George C. Gibbs, for complainants.

THE CHANCELLOR.—Where no preliminary order is required it is not necessary that the bill should be sworn to, although the answer under oath is not waived. This is not required by the English practice, or by the rules of this court, as they now stand.

As to the other point raised by the demurrer, it is alleged that, in the proceedings to foreclose under the statutes by advertisement, a mistake occurred which renders the proceedings irregular and voidable.

It would certainly be in the power of the mortgagee to waive those proceedings and commence *de novo* under the statute. And this being undoubtedly competent, I can see no reason why he may not avail himself of the right he had in the first instance, and seek his remedy in this court. If he seeks his remedy here he, of course, waives the proceeding under the statute, and all claim for costs under that proceeding.

I can see no reason for the argument that, by first proceeding * under the statute, which proceeding, by mistake 246 or accident, is inoperative or void, the party has made his election and cannot have relief here.

The demurrer must be overruled with costs.

Thayer v. Lane.

Charles Thayer and others v. Marcus Lane, administrator, etc., and others.

1h 267
1 300

Equity jurisdiction: Partition. Equity has jurisdiction to make partition between joint owners of lands, notwithstanding a remedy at law is given by statute.

Demurrer, when too broad. Where a demurrer is to the whole discovery and relief prayed by the bill, if the complainant is entitled to any part of the relief, the demurrer must be overruled. (a.)

Injunction to stay probate sale: Disputed rights. Where an administrator under a license from a judge of probate was proceeding to sell the interest of the intestate in sixteen village lots, which interest was stated to be one undivided half, upon a bill filed by the other parties interested, stating that the intestate owned only an undivided interest of one-third, an injunction was granted to restrain the sale, and the chancellor refused to dissolve the injunction until the interest of the intestate was ascertained and settled.

The bill in this case was filed for a partition, and states that Samuel Wheeler and Richard H. Root (both deceased), of the State of Ohio, were, in their lifetime, seized in fee as tenants in common, of certain village lots in the village of Ann Arbor, in the State of Michigan; that said Wheeler died intestate, leaving five children, his heirs at law. That Root was seized of two equal undivided third parts of said village lots, and Wheeler was seized of the other equal undivided third part thereof. That Charles Wheeler, brother to Samuel Wheeler, was appointed administrator upon the estate of Samuel Wheeler, in the State of Ohio, and was also appointed guardian for Amanda Wheeler, one of the heirs.

That about June 18, 1834, William Munroe, of the State of Ohio, was treating with Root for the purchase of his interest in the lots; that it was finally agreed between Root, Munroe and Wheeler, administrator, that he, Wheeler, should have his first

(a.) See *Clark v. Davis*, ante, 227; *Williams v. Hubbard*, Wal. Ch., 38; *Edwards v. Hulbert*, Wal. Ch., 54; *Burpee v. Smith*, Wal. Ch., 327; *Manning v. Drake*, 1 Mich., 34; *Hawkins v. Clermont*, 15 Mich., 511.

Thayer v. Lane.

choice of four of the lots for and in behalf of the heirs of S. Wheeler, and that Root should take the remaining twelve for his portion ; and that C. Wheeler and Munroe should proceed from Madison, in the State of Ohio (where this arrangement was made), to Ann Arbor, in the State of Michigan, and make partition according to said understanding and agreement.

*That it was the express agreement that the four lots to 248 be first selected were equal to one-third part of the sixteen lots in value. That Root and wife conveyed to Munroe, by deed, twelve equal undivided sixteenth parts of said lands, to be held in common with the heirs of S. Wheeler. That soon afterwards, Wheeler, administrator, and Munroe proceeded to Ann Arbor and made partition, and Wheeler, the administrator, chose and selected lots numbers 15 and 16 in block number 2, north of Huron street, range 6, and lots numbers 4 and 5 in block 3, north of Huron street, range 3, as the four lots to be by him selected for the heirs, and that Munroe accepted and received the other twelve lots as his portion, and assented to such partition and division.

That September 10, 1834, Munroe deeded to complainant Charles Thayer the said twelve lots; that the deeds from Root and wife to Munroe and from Munroe to complainants were duly recorded, etc.; that the deed from Munroe to complainant Thayer was intended to convey to complainant Thayer the entire interest Munroe had in said 16 lots. That complainant Thayer took immediate possession of the lots, and continued in possession; that in the month of December, 1834, Thayer conveyed lots numbers 6, 7 and 8 in block 3, to complainant, George Klindedob; lots 5 and 6 in block 2 to William J. Brown; lot number 4 to Caroline Brown; the deeds of which said several lots were duly recorded, etc. That lots numbers 4 and 5 had since, by several intermediate conveyances, been conveyed to complainant George Ward; that lot number 6 has been conveyed to complainant William F. Leaman, by deed bearing date December 6, 1836, recorded April 8, 1837; that complainant Thayer conveyed lots 7 and 10 in block 3 to A. Burr Harrington, and he conveyed

Thayer v. Lane.

the same to Samuel Hamlet, who then owned and occupied the same; that the purchasers of said lots respectively had taken possession of the same and made valuable improvements in good faith, and with the full belief that the purchasers thereof respectively had good and perfect titles to the same. The bill states that partition may be made of the said sixteen lots so as

249 to save to complainants their respective *improvements, and still do justice to all persons interested in said premises. The bill further states that Marcus Lane has been appointed administrator of said Samuel Wheeler, deceased, by the judge of probate of the county of Washtenaw, State of Michigan, and that he has published notice that he would expose for sale at public vendue at the court house in the village of Ann Arbor, on the third day of August instant, the equal undivided half of all of said lots, by virtue of a power and license granted by the judge of probate of the county of Washtenaw, aforesaid, authorizing the sale of the real estate belonging to the estate of the said Samuel Wheeler, deceased. And the bill prayed an injunction to restrain the sale, which was granted.

Defendant Lane, the administrator, demurred to so much of the bill as prays for relief and discovery, and as relates to the agreement in the bill mentioned between Charles Wheeler and William Munroe for a division and partition of the premises, and assigns for causes of demurrer, that the complainants have a full and complete remedy at law if they are entitled to any relief.

Defendant Lane also answers and admits that Samuel Wheeler and Richard H. Root were seized of the premises in question as tenants in common, in equal proportion; as to the statement in the bill, that Wheeler owned one-third and Root two-thirds undivided, he knows not and cannot answer as to his belief or otherwise. Admits the death of Samuel Wheeler, leaving certain persons his heirs at law whose names he states are unknown to him; admits that the complainants and the defendant Howlet have acquired a title to an undivided interest in the premises, but how or by what means, or what title or interest they have acquired, he

Thayer v. Lane.

knows not, and cannot answer as to his belief or otherwise; that he has been informed and believes that Ward, Klinedob and Leaman, complainants, have made valuable improvements on some parts of the premises, but upon which part he does not know, and cannot answer.

Admits his appointment as administrator, and sets forth all the proceedings under that appointment, and states that he has no estate or interest in the premises except as administrator; admits that he gave notice of his intention to sell the equal undivided *half part of the premises under an order from the 250 judge of probate for the payment of the debts due from the estate of Samuel Wheeler, which estate is reported insolvent, and states that he intends to sell as soon as the injunction is dissolved; states that he has paid all taxes which he could find returned to the register's office against the premises, without regard to the interests of the complainants or any other person.

The cause was heard upon the demurrer and a motion to dissolve the injunction.

Marcus Lane, in support of the demurrer and motion to dissolve the injunction.

1st. It does not appear that Charles Wheeler was appointed administrator by any court or authority having power to appoint.

2d. It does not appear that said Charles, if appointed by authority, accepted of the appointment, and entered upon the duties of his office.

3d. It does not appear that said Charles, if appointed and qualified according to the laws of Ohio, had any power or authority to lease, sell, divide or control the real estate of his intestate.

4th. It does not appear that said Charles Wheeler was ever qualified or authorized to administer upon the estate of said intestate within the State of Michigan.

5th. That an administrator, appointed according to the laws of another State, has no power, or authority, or control over the estate of an intestate within this State, unless specially authorized

Thayer v. Lane.

by a court of competent jurisdiction in this State. (3 *Mass. Rep.*, 514; 11 *Ib.*, 313; 10 *Wheaton*, 192; 1 *Cranch*, 259.)

6th. That an administrator, appointed according to the laws of this State, has no power or authority to divide, sell or otherwise dispose of the lands of his intestate, except for the purpose of paying the debts of his intestate. (4 *Mass. Rep.*, 358; 1 *Ib.*, 45, 46; 2 *Ib.*, 478.)

7th. It does not appear that the partition was reduced
251 to *writing, or that it was made by said Charles in his capacity of administrator.

8th. That complainants have a full and ample remedy at law.

Miles and Wilson, contra.

1st. As to the demurrer.

A court of chancery has *concurrent* jurisdiction with a court of law, to compel partition between tenants in common. (1 *Madd. Ch.*, 244; *Coleman v. Hutchenson*, 3 *Bibb*, 209.)

The title here is not disputed; the only question is as to the *extent* of the interest of the respective parties. The complainants' right to one equal undivided *half* part of the premises is admitted by the answer.

The answer does not disprove the facts stated in the bill.

The defendant, Lane, has omitted to answer the statements in the bill:

1st. That Charles Wheeler was appointed administrator in Ohio, and also guardian to one of the minor heirs.

2d. That Charles Wheeler agreed with R. H. Root, the other tenant in common, to make partition of the sixteen lots; the demurrer only admits the agreement between Charles Wheeler and Munroe.

3d. That Charles Wheeler and Munroe made partition; that Munroe immediately gave a deed of the twelve lots which fell to his share, to Thayer, the complainant, who took possession.

The defendant admits that complainants and Howlet, one of the defendants, have acquired a title to an undivided interest in

Thayer v. Lane.

the premises; that Ward, Klindedob and Leaman have made improvements, but leaves unanswered the fact that defendant Howlet has made improvements on his lot.

The fact that the four lots remaining unsold by Thayer are *of equal value with any of the eight sold by him, 252 setting aside improvements, is unanswered.

The material fact, that Root was seized of two third parts and Samuel Wheeler of one third part of the premises, is left unanswered; the defendant, Lane, does not even state that he believes it untrue. (See *Apthorpe v. Comstock*, *Hopk. Ch.*, 148.)

The defendant insists that the complainants can only claim under the legal title, and that they must go to the law courts and have partition under that title. (See *Madd. Ch.*, 3d *Amer. ed.*, 244; *Coxe v. Smith*, 4 *Johns. Ch.*, 271.)

But here has been a partition by parol, and a long continued possession under it. The defendant has not answered this part of the bill; he does not deny Thayer's possession, and those holding under him; and to the charge that he, as administrator, has taken possession of the four lots selected by Charles Wheeler, and has paid the taxes thereon, he answers evasively as to the payment of taxes, and as to taking possession there is no answer. (See *Jackson v. Brown*, 3 *Johns.*, 459, *as to partition by parol.*)

But was Charles Wheeler, as administrator and guardian, authorized to act in making partition? The validity of his acts is not questioned by the answer; that he did act in making the partition is admitted by the demurrer; and that the defendant, Lane, has acquiesced in this division, and ratified the partition, appears from the fact, not denied by the answer, that he took possession of the four lots selected by Charles Wheeler for the heirs. (See *Jackson v. Richtmyer*, 13 *Johns.*, 367.)

But further, as to the improvements. Partition may be made, reserving to the complainants their improvements, without prejudice to the other persons concerned; this is not denied. On a partition every part of the estate need not be divided. (1 *Madd. Ch.*, 245.)

Thayer v. Lane.

THE CHANCELLOR.—That courts of equity have jurisdiction in cases for partition, where the facts are like those here presented, is well settled.

The demurrer here being to the whole discovery and relief, cannot be sustained; the demurrer must, therefore, be overruled.

253 *As to the injunction, I have had some doubt whether the defendant, Lane, should not be permitted to sell whatever interest the estate may have in the premises; but as the amount of the interest of the several parties is disputed, it being alleged in the bill that the heirs of Wheeler are in fact entitled to but one-third of the premises, and the defendant, Lane, proposing to sell one-half, a sale would further embarrass the title, and I think the injunction should be retained until those rights are ascertained and settled.

Demurrer overruled and injunction retained.

Pratt v. The Bank of Windsor.

Pratt and Barker v. The Bank of Windsor.

Subpœna, service of. The service of a subpœna upon a defendant out of the State is irregular.

This was a motion to set aside the default entered in this case, and the service of the subpœna, on the ground that the subpœna was served out of the State. It appeared that the subpœna was served on the defendants in the State of Vermont.

D. Goodwin, in support of the motion.

The service of the subpœna was irregular and void ; the service and all subsequent proceedings must, therefore, be set aside. (*R. S.*, 366, 367, 371 ; *Dunn v. Dunn*, 4 *Paige R.*, 425.)

T. Romeyn opposed the motion, and cited 1 *Hoff. Pr.*, 110 to 112, *n.*

THE CHANCELLOR.—This motion must be granted on the authority of the case of *Dunn v. Dunn*, 4 *Paige*, 425. The case is fully considered, and Chancellor Walworth, after a full examination of all the authorities upon the subject, comes to the conclusion that the service of a subpœna out of the State is irregular.

Motion granted.

Jerome v. Seymour.

Jerome v. Seymour.

Exhibits at the hearing. Where the assignee of a mortgage files a bill to foreclose, setting forth the mortgage and assignment, he may, upon the notice required by the 62d rule to the opposite party, have an order to prove the assignment as an exhibit at the hearing under the provisions of rule 56.

This was a bill of foreclosure filed by the assignee of the mortgage.

The mortgage and assignment to the complainant were set forth in the bill.

Complainant gave four days' notice, under the provisions of rule 62, of a motion for an order to prove the assignment of the mortgage as an exhibit at the hearing under the provisions of rule 56.

E. C. Seaman, for complainant.

W. Hale, for defendant.

The court granted the order. (a.)

(a.) Rule 56 was as follows:

"Documentary evidence, which is neither made an exhibit before the commissioner, or set out, or distinctly referred to in the pleadings, shall not be read on the hearing, unless notice of the intention to use it at the hearing is given to the adverse party, at least ten days before the expiration of the time allowed to produce proofs, and no deed or other writing shall be proved at the hearing, except on an order previously obtained, after due notice to the adverse party."

See *Bachelor v. Nelson*, Wal. Ch., 449, for a decision under this rule.

Higgins v. Carpenter.

Higgins and others v. Carpenter and another.

Waiver of default. A defendant who had defaulted the complainant for failure to serve a copy of the bill, afterwards filed his answer and moved to dissolve an injunction. *Held*, a waiver of the default. (a.)

Motion for decree. Applications for final decree must be made at a general term, even though they be based on a default.

This was an application at a special term, for confirmation of a decree to dismiss the bill.

H. N. Walker, for defendants, at a special term, on affidavit of the entry of an order for service of copy of the bill in 15 days, as required by rule 20 of this court, and of the due service of notice of the order, and also stating that no copy of the bill as required by the rule had been served, and that defendants have entered a decree in vacation with the register of the court, dismissing the bill with costs, now moved for the confirmation of the decree dismissing the bill.

B. F. Cooper, for complainants, produced an affidavit, from which it appeared that the defendants, after the entry of the decree dismissing the bill, had moved the court for a dissolution of the injunction on the bill and answer served upon him since the entry of the decree dismissing the bill.

He insisted that by the practice of this court, under rule 17, a defendant may answer either with or without the service of a copy of the bill. If he chooses to save the expense of a copy of the bill, by resorting to the pleadings on file in the register's office, he can do so. If he claims a copy of the bill, he may compel the service of a copy by virtue of rule 20. That rule is one for the defendant's accommodation in answering; and if subsequently to the entry of an order for service of a copy, he accepts a service

(a.) See *Brooks v. Mead*, Wal. Ch., 389.

Higgins v. Carpenter.

for any purpose, the object of the rule is answered, and the order is waived.

257 *If the order requiring service of a copy of the bill were not so waived, the motion to dissolve the injunction on the bill and answer served after the decree to dismiss was a waiver of that decree, in accordance with the rule which waives an irregularity, by taking proceedings in the cause subsequently to it, without taking advantage of this irregularity. (*4 Paige*, 288, 439; *2 Johns. Ch.*, 242; *5 Ib.*, 191.)

THE CHANCELLOR.—The defendants having subsequent to the default filed their answer, and based thereon a motion to dissolve the injunction, have waived the right to dismiss for want of service of a copy of the bill.

Further: This being an application for a final decree in the cause, should be made at a general term. (*Rose v. Woodruff*, *4 Johns. Ch.*, 547.)

Kellogg v. Barnes.

Kellogg v. Barnes.

Injunction dissolved on default. Where the complainant had due notice of a motion to dissolve an injunction, and he neglected to appear and oppose the motion, the defendant was permitted to take his order dissolving the injunction with costs.

Motion to dissolve an injunction.

B. F. Cooper, for defendant, moved, in tendering admission of due service of a notice of the motion, that the injunction issued in this cause be dissolved for want of equity in the bill. No counsel for the complainant appearing to oppose, Cooper contended that the practice in such cases was, or should be, that the motion be granted with costs, without the papers being read or any further account given to the court than simply to state the application to be made, and show by admission or affidavit that notice had been brought home to the opposite party. (*1 Smith's Pr.*, 66; *Rule 62*, 69; *2 Caines' R.*, 379, 380; *3 Caines' R.*, 82; *1 Hoff. Pr.*, 551; *1 Dunlap's Pr.*, 327, 350-352.)

H. N. Walker, as *amicus curiæ*, suggested that the former practice of the court had been to look into the papers as if they had been submitted on argument.

THE CHANCELLOR.—Where a party, after service of notice of motion, neglects to appear and oppose, the court say, by not appearing he consents to the application. (*Ekhart v. Dearman*, *2 Caines*, 379.) Such, also, appears to be the practice in England.

The defendant may take the order that the injunction be dissolved with costs, stating in the order, however, that no one appeared on the motion to oppose.

 Walton v. Torrey.

Hannah Walton and others v. Joseph W. Torrey and others.

 1h 200
 2 194
 2 330
 1 220
 3 100

Restraint upon alienation. The provision in a will that the estate shall remain undivided until the youngest of the devisees becomes of the age of twenty-one years, is not such a limitation as will inhibit any one of the devisees from conveying his interest in the premises.

Provisions in restraint of alienation are not to be favored. (a.)

Probate sale : Judge interested. Where a sale of real estate was ordered by a judge of probate, and it appeared that he himself became interested in the purchase, the sale was set aside, and a resale ordered to be made under the direction of the court. (b.)

The bill of complaint was filed in September, A. D. 1836, and states that in May, A. D. 1825, one Jesse Hicks, of Wayne county, Michigan, was seized and possessed of a certain farm on the River Rouge, in said county, called the Hicks farm ; and that said Jesse duly made and published his last will, dated May 7, 1825. The provisions of the will are set forth as follows :

1st. My will is, that all my just debts and funeral expenses be paid out of my personal property.

2d. That as regards my real estate, my will is, that it remain undivided in the use, occupation and possession of all my children now living, until the youngest attains the age of twenty-one years, and that until that time, the rents and profits be equally applied in and towards their support and education ; that when and so soon as the youngest child shall have attained the age of twenty-one years, my will is that an estimation of all the value of my real estate be made by Orville Cook, of Detroit, and Henry I. Hunt, of the same place, or if they should not be living at that time, then by such persons as they may have nominated, and after such estimation and valuation, that the said real estate be

(a.) See *St. Amour v. Rivard*, 2 Mich., 294.

(b.) See *Beaubien v. Poupard*, *ante*, 206, and cases referred to in the note.

Walton v. Torrey.

divided equally, and share and share alike among my children now alive, or the survivors of them, and the heirs of any who may die previous to such division.

3d. Such part of my stock and personal property as may remain after payment of my debts, I will to be distributed, one-third to my wife, and the remainder to remain for the use of the farm.

*4th. My will is, notwithstanding, that my wife be entitled to the use of the homestead during her life, and also the profits of one-third part of the farm on which I live. 260

5th. I hereby revoke and annul all former wills, testaments, codicils or parts of the same heretofore made and executed.

In witness whereof, etc.

The bill further states, that in May, 1825, said Jesse died, leaving the complainants, Hannah Walton, now Hannah Hicks, his widow, and Jesse A., Betsy, Hannah, Adaline and Theodore E. Hicks; also Caroline Hicks (since deceased, without issue,) and Andrew Hicks (supposed deceased), his children surviving him; that the farm has not been sold to pay said Jesse's debts; that said widow and children, except Andrew and Caroline, are sole surviving devisees of said Jesse's will; that said Theodore is youngest, and will be twenty-one years old in the year 1841; that Larned and Torrey were, in 1829, and previously, lawyers practicing in Detroit; that after said Jesse died, his said wife and children believing said L. and T. had been the counsel of said Jesse, applied to them for advice as to the rights and duties of said widow and children under said will; that said L. and T., by a show of kindness and regard, gained the entire confidence of the said widow and children in their legal ability and integrity, and became their counsel, and had their papers relating to said will, and knew all the rights and duties of said widow and children under said will, and knew that said Theodore would not be of age till A. D. 1841; that L. and T. in 1829 told said widow and children that they might sell or encumber said Hicks' farm notwithstanding said will, which they said was invalid, and that

Walton v. Torrey.

said children were heirs at law, and that said wife and children, up to the year 1832-3, when Torrey left the country, believed the above statements of said L. and T.; and that said L. and T. induced said widow to convey her interest in said farm, by telling her that such conveyance would not expose her to be turned off said farm, and that she and her children should have possession thereof; and that said widow made such conveyance, being ignorant of the effect thereof, March 10th, 1832. That at the

261 same time said Jesse A. *Hicks conveyed to said L. and T. his interest in said farm as heir at law of said Jesse, stating he would not thereby lose possession thereof till 1841; and that April 6, 1832, by similar statements, L. and T. procured a deed from complainants Blanchard and wife, while the wife was a minor, of one-sixth part of said farm; and that said L. and T. by the aforesaid representations induced Downer and wife (a minor) to convey one-seventh of said farm to one Frazer, and then seized the first opportunity to get a deed from Frazer to themselves.

The bill further states, that in 1832, said Torrey, as judge of probate of Wayne county, appointed one Johnson guardian of said Theodore and Adaline, and soon after gave him license, on application, to sell the interests of said Theodore and Adaline in said farm; that said Johnson then sold and conveyed the same to one Sawyer, and said Sawyer to said Larned and Torrey; that said sale was unnecessary, and without consideration either from Sawyer or Larned and Torrey; that Larned and Torrey procured the appointment of said Johnson, and his deed to said Sawyer, solely to get title to the interests of said minors. The bill adds that Larned died in 1834, and that his heirs since pretend that said Larned and Torrey leased said farm to one Isaiah Walton, who had married said widow, and that she held said farm under him; and charges that if so, said lease was without the consent of any of the complainants, and in order to undermine them; and that said widow never pretended to hold under said Isaiah, but only under said will; that said Torrey and heirs of said Larned

Walton v. Torrey.

have turned said complainants off from the farm, and that they have been thereto restored; that they have since commenced and discontinued two suits, and afterwards commenced a third suit to recover possession of said farm.

The bill prays for a re-conveyance from Larned's heirs and Torrey of their interest in said farm, and that the deeds to Larned and Torrey and Sawyer be canceled, and for an injunction to stay defendants from proceeding under the forcible entry and detainer act, and from selling or effecting possession.

The defendant Torrey puts in his answer, which is substantially *the same with the answer of Sawyer and that 262 of the infants; which last defendants set forth some facts in addition to those stated in the answers of Torrey and Sawyer.

All said answers admit the seizin of Hicks in said farm, and that he died and left such will and such children as is stated in the bill, but express ignorance as to date; submit whether said Jesse's children were not seized in fee of said land, as heirs at law, and were competent to convey it; and whether the estates of said infant complainants were not subject to alienation, like those of all infants, by order of probate court; admits partnership of Larned and Torrey, from October, 1825, to 1833, but say they had nothing to do with the estate of said Jesse, and never made any representations to complainants, as alleged in the bill; that the said Jesse A. Hicks first offered his and his brother Andrew's share in said farm to Larned and Torrey for \$200, to pay for defense of said Andrew against an indictment; that afterwards said Jesse A. and his mother urged Larned and Torrey to buy her share, and agreed to give immediate possession, or to rent the farm at \$50 per year, and that they afterwards bought the shares of Blanchard and Downer. All these purchases they made reluctantly and at the urgent solicitation of Jesse A. and his mother, and *paid* \$100 per share; defendants deny that they told complainants their selling would not make them liable to be turned off of said farm or lose possession till the youngest was of age; defendants admit plaintiffs' statements as to the sale of the

Walton v. Torrey.

infants' shares, by order of Torrey, as judge of probate, but deny all fraud or irregularity or illegality in the same, and say full consideration was paid for the same, and deny any connection of Larned and Torrey with the proceedings relating to said sale, and deny all fraud and all intent to commit fraud on the part of Sawyer in the sale, and deny all fraud generally, and all intent to oppress or harass said plaintiffs in proceedings to obtain possession of said farm in 1836.

H. T. Backus, for complainants.

J. M. Howard, for defendants.

263 *THE CHANCELLOR.—Whether the children of Jesse Hicks, deceased, the complainants in this case, take as heirs or devisees, they take an estate in *presenti*, and whatever interest they have it is competent for them to convey. The provision in the will, that it should remain undivided, is not such a limitation as would inhibit any one from conveying whatever interest he possessed. Provisions in restraint of alienation are not to be favored. Whether any purchaser could enforce a partition before the youngest child became of age, so long as either of the heirs or devisees retained his interest, is a question that does not arise in this case. The interests being then alienable, it was within the jurisdiction of the judge of probate to decree a sale of the right, title and interest of the two minors, Adaline and Theodore E. Hicks, upon a case being made upon the happening of which the statute authorized the sale of the lands of minors for their support and maintenance.

The proceedings appear to have been regular.

The decree of the judge of probate stands of force, and not appealed from.

It is too late, therefore, to interfere with the decree. As to the sale and purchase in fact, by Larned and Torrey, Torrey having been the judge of probate who granted the order, I have had some doubt. But the case of *Devaux v. Fanning*, 2 Johns. Ch., 268, goes the full length of declaring such a sale void.

Walton v. Torrey.

It is placed upon the ground of disability to purchase, arising from the office which the purchaser held. And the case quoted by Chancellor Kent on that occasion extends the disability to guardians, judicial officers, and all other persons who in any respect, as agents, had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise.

What is the case here? The defendant Torrey, acting as judge of probate, having previously acquired certain portions of this property, makes the order for the sale of the shares of these minor heirs. He becomes a joint purchaser through Sawyer.

If there is any wisdom or justice in the rule, it seems to me *that this presents a very proper case for its applica- 264 tion. Without attributing any intention to commit a fraud, and there is nothing from which to infer it in this case, it seems that there can be no office or trust which would present stronger temptations for abuse than that of the one occupied by Torrey, if the real estates of minors could be directed to be sold and purchased by the same individual. As to this portion of the case, then, I am disposed to follow the course pursued in the case of *Devaux v. Fanning*. As to the claim of Mrs. Blanchard and Mrs. Downer, the daughters of the deceased, they are alleged to have been minors at the time of the execution of the deed. As the result in this respect must depend upon the establishment of the fact of minority, an issue must be directed to try that fact. The shares of the two minor children, Adaline and Theodore E. Hicks, must be put up for sale under the direction of the master, at the same price at which they were sold to Larned and Torrey, as a minimum; if no more is offered, the former sale to stand confirmed; if more is offered, the master to proceed to sell the same, and upon being paid the consideration, to execute a deed thereof to the purchaser, and to bring the money arising from such sale into court to abide the further order of the court in the premises. As to the sales made by the other complainants, there is no ground for the interference of this court in the premises.

The injunction heretofore granted in this cause to be dissolved.

Graham v. Elmore.

Graham and another v. Elmore and another.

Solicitor ; signature by one who is not. Where a solicitor has appeared in a cause, and a demurrer is filed, signed by solicitors who have not appeared, the demurrer may be treated as without signature and as a nullity.

But where the demurrer in such case was treated as a nullity by the complainants, and a default was entered for want of an answer, and it appeared that the signature of the wrong solicitors was put to the demurrer by mistake, and that injustice would be done if the defendant should not be permitted to answer, the default was set aside on terms.

Decree : Cause cannot be severed. Where there are joint defendants the complainant cannot, upon a *pro confesso* obtained against one, before the cause is at issue or in readiness for hearing against the other, enter a final decree and issue execution thereon against the party against whom the bill has been taken as confessed, and leave the cause to proceed against the other defendant.

A final decree, or an interlocutory decree, which, in a great measure, decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the court.

This court will not adjudge upon a part of the case ; it will not make a final decree until the case is properly presented in such form as will enable the court to make a final disposition of the case, and do justice to all the parties.

Where a cause is in readiness for hearing against one defendant, and there is another defendant as to whom the cause is not in readiness, the defendant who has appeared and answered cannot notice the cause for hearing, but must move to dismiss the bill for want of prosecution if the complainant fails to expedite it.

Solicitor ; motion by one who is not. It is no objection to an order that it purports to be made on the application of one who is not the solicitor in the cause. It is not necessary that an order should show on whose motion it is made.

Setting aside default. A decree by default may be set aside, on motion, without petition, where the facts upon which the motion is based appear by the record.

The bill in this case charged that the defendant, William H. Elmore, had obtained goods of the complainants, who are merchants in New York, to the amount of about \$600, on the credit of one Frederick W. H. Elmore, by representing to the complainants that he was the agent of F. W. H. Elmore to purchase goods for him on credit ; that this representation as to the agency was entirely false, and that William H. Elmore purchased these goods on this fraudulent representation for his own benefit, and that he

Graham v. Elmore.

executed to the complainants two notes for about \$300 each, subscribed with the name of F. W. H. Elmore, in his assumed capacity as agent; that after these goods were obtained, they were forwarded to Detroit, where William H. Elmore for some time carried on mercantile business under the name of F. W. H. Elmore; that subsequently, an assignment of this store of goods was made by an instrument *in writing, signed F. 266 W. H. Elmore, by W. H. Elmore, his attorney, to Hicks, and in which was also a covenant that it passed all right and title of W. H. Elmore to the goods. The bill charged that when this assignment was made, Hicks had knowledge of the fraud of Elmore in obtaining complainants' goods; and the bill contained, also, a charge in relation to the assignment of the goods in the store, in the following terms: "among which said merchandise, your complainants' charge was included, the merchandise, so as aforesaid, purchased of your complainants, or the portion of them which remained undisposed of by the said William H. Elmore, but which particular part or portion of the same, complainants were ignorant."

The bill further charged that complainants parted with their goods in the confidence in the truth of this representation; that they did not discover the fraud until after the notes were due and until after they had demanded payment of them at the store where William H. Elmore had traded; that after discovering the fraud, they demanded a return of the goods of Hicks and Elmore, or the unsold portion of them, which they refused to return; that complainants had commenced no legal proceedings against defendants, except the filing of this bill.

The first prayer of the bill was that defendants might answer, the defendant Hicks under oath, but the defendant Elmore without oath, from an inspection of the inventory, invoices and books, what goods were obtained from complainants, and what portion of them were assigned to defendant Hicks; what portion of them were sold by William H. Elmore before the assignment, and what portion by Hicks since the assignment, and for what; that a

Graham v. Elmore.

receiver, with the usual powers, might be appointed, of complainants' goods in the hands of defendants, or either of them, and that the unsold portion of them be delivered to the complainants; that Elmore be liable for the interest of the whole goods, to the time of the assignment to Hicks, and for the amount of goods sold by him; that both defendants, or either of them, account for the goods sold by Hicks since the assignment, and the interest upon the unsold portion of them since the assignment, and be personally liable therefor; that defendants be enjoined from
267 assigning or *disposing of the goods or their proceeds, and for such other and further relief herein as the court may order.

Or, secondly, that defendants might answer and be enjoined, as aforesaid; that they be decreed to return the unsold portion of the goods to complainants, and to account and be personally liable, as aforesaid, and for complainants' costs. The complainants prayed for general relief. Their prayers were all in the disjunctive.

The bill was taken *pro confesso*, and after the cause had been set down on the orders *pro confesso* for a hearing, and notice for a final decree, H. N. Walker, for defendant Hicks, applied on affidavit to the chancellor for leave to have the order, *pro confesso*, against him opened, and leave to answer. The affidavit stated that previous to the entry of the default, H. N. Walker gave notice of retainer for Hicks, and that a demurrer had been filed on the part of Hicks, and that by mistake the name of the firm of Bates, Walker & Douglas was signed to the demurrer; that complainants' counsel had treated the demurrer as a nullity on that account, and had entered the default. The affidavit was accompanied by an affidavit of merits, and an answer proposed to be put in. The chancellor granted an order that the complainants show cause before him at his chambers why the demurrer should not be withdrawn, the order, *pro confesso*, opened, and defendant Hicks have leave to answer; and that defendants' solicitor serve on the complainants' solicitor the affidavit of mer-

Graham v. Elmore.

its, the answer prepared to be filed, and a copy of the order to show cause at least four days before the time of hearing.

B. F. Cooper, for complainants, read an affidavit, from which it appeared that on entering the order, *pro confesso*, the complainants had served a notice upon the defendants' solicitor of the entry of such order, and offered to open the same without costs, provided a full and sufficient answer were served before the first day of the term, for which the cause had been set down for a hearing on the orders *pro confesso*; that no answer had been filed, and that two special terms had elapsed since the entry of the orders *pro confesso*; and that defendants *had 268 taken no previous steps in the case, and insisted:

1. That the application of the defendant was now too late. (2 *Johns. Ch.*, 242; 4 *Paige*, 288, 439.)

2. That the affidavit of merits was not sufficiently full, and gave no sufficient excuse for the delay; that the answer was exceptionable for insufficiency; he examined the whole case upon the bill and answer served, and insisted on the authority of the decision in 6 *Paige*, 371; 5 *Ib.*, 164; 1 *Hoffman*, 7, 551, that the order *pro confesso* should not be opened, as from the answer presented it appeared that the defendant, although attempting to interpose the defense of a *bona fide* purchaser without notice, had nevertheless admitted and shown such a knowledge of facts and circumstances relating to the fraud as charged as to put him on inquiry, and to charge him with constructive notice of the fraud; that no injustice, therefore, would be done to the defendant by refusing this motion, but injustice would be done to the complainant if it were granted.

3. That the opening of the order is a matter resting in the sound discretion of the court, who is to see that no injustice is done. If it be now opened, the defendants should be required to pay all costs of the suit subsequent to the proceedings to take the order, *pro confesso*, and the costs of the motion. They should put in a sufficient answer, and submit to such equitable terms as

Graham v. Elmore.

the court may impose, to expedite the cause, and to ascertain the facts of the case. In this case, the defendants should, as equitable terms, be required to stipulate that the complainants under the issue may, if they shall so elect, examine the defendant Elmore as a witness, without a waiver of any liability to them; and if complainants shall so elect, they may themselves also be examined as witnesses in the cause, and that a commission may be taken out to obtain their testimony. The tendency of chancery practice in modern times is to let in evidence from all quarters, to satisfy the conscience of the court.

269 **H. N. Walker*, for defendant, cited 3 *Chit. Gen. Pr.*, 525; 7 *Paige*, 370; 6 *Ib.*, 371; insisted that the demurrer was regular, and a valid proceeding in the cause until set aside. That if the demurrer were irregular he should be allowed to answer on terms.

THE CHANCELLOR.—The demurrer, having been signed by solicitors whose appearance had not been entered in this case, might, where another solicitor had appeared for this defendant, be treated as without signature, and as a nullity. (3 *Chitty's Gen. Prac.*, 524.)

But the demurrer having been filed in this form by mistake the court would relieve the party from the consequences, if satisfied that injustice would be done if the party should not be permitted to answer.

The answer discloses: *First*, that, as defendant Hicks believes, W. H. Elmore was authorized to purchase the goods in the name of F. W. H. Elmore. If this be true, no fraud was committed. *Second*, that he purchased the goods without any knowledge of the complainants' claim. (See *Mowry v. Walsh*, 8 *Cow.*, 238.)

The answer further discloses such circumstances in relation to the knowledge of F. W. H. Elmore of the manner in which the business was conducted, as must, in all probability, establish his liability, if any doubt existed on that subject.

The circumstance of the defendant Hicks having taken a

Graham v. Elmore.

separate guaranty of W. H. Elmore, is urged as strong evidence of fraud. It may, perhaps, lead to a conjecture that Hicks was suspicious that W. H. Elmore had some individual *interest in the property; but, accompanied as it is by 270 the positive denial of Hicks of any knowledge of the complainants' claims, and, also, the statement in his answer, that, according to his knowledge and belief, the goods were really the property of F. W. H. Elmore, cannot be regarded as such a badge of fraud as would render the sale to him fraudulent and void.

The answer is objected to, as not being full and perfect. The rule laid down in *Hunt v. Wallace*, 6 Paige, 377, and which has before been recognized in this court, in the case of the *Bank of Michigan v. Williams*, ante, 219, is, that the defendant must either furnish the answer which he proposes to put in, or state his defense so fully in his affidavit that the court may see that injustice would probably be done if the order, taking the bill as confessed, is permitted to stand.

The court should require a full answer, and, if satisfied that the answer was intentionally evasive, would refuse to set aside the order.

Such is not the case here. The answer discloses sufficient to show that injustice would probably be done if the order is permitted to stand. Should the court undertake to look into a further or amended answer, it would involve a re-examination of the papers, which may as well be done by a master. Besides, the court is not fully satisfied that the answer will be found insufficient; but, as the court is inclined to think the complainant may be entitled to a further discovery in some particulars, the defendant should be compelled to answer such exceptions as may be allowed promptly.

The order, taking the bill as confessed, must be set aside upon payment of costs of entering the order, and of this motion, and the defendant's undertaking to answer such exceptions as may be allowed by the master, within five days after the same may be

Graham v. Elmore.

filed, and upon stipulating that the complainants may be examined as to the particular goods sold to Elmore, saving all exceptions, except as to the competency of receiving such testimony.

271 *After the order of the chancellor, directing the opening of the order, *pro confesso*, entered against Hicks, and after Hicks had filed and served a copy of his answer, denying the fraud charged against Elmore, and setting up the defense of a *bona fide* purchaser without notice, etc.,

B. F. Cooper, for complainants, moved, *ex parte*, on the order, *pro confesso*, against Elmore, for want of appearance, for a final decree. He cited *1 Smith's Ch. Prac.*, 64, 174, 175.

No person appearing for defendant Elmore, the complainants took their final decree, *ex parte*, against Elmore, for the full amount claimed in the bill, and costs, and afterwards proceeded against him by creditor's bill.

Henry N. Walker gave notice of retainer for defendant Elmore, and moved (on the affidavit of Elmore, of irregularities, etc.) for an order for complainants to show cause why the final decree entered December 8, against Elmore, should not be set aside for irregularity. The chancellor granted the order to show cause.

B. F. Cooper, for complainants, showed cause.

I. The decree in this cause cannot be set aside on the ground of the insufficiency of the papers on which the motion is founded.

1. Because after the entry of an order, *pro confesso*, it is a general rule that it cannot be set aside without a production of the answer intended to be filed. The exception in the books was in the case of a *non-resident*, and then the motion was made before enrollment. (5 Paige, 164; 6 Paige, 377.) The last case was before decree entered.

2. After the enrollment of the decree, the rule is now believed to be universal, that the application to set it aside must be on the production of the sworn answer proposed to be filed, with a full

affidavit of merits. (*1 Hoffm. Pr.*, 551; *1 Johns. Ch.*, 541, 631; *1 Paige*, 430; *3 Ib.*, 407; *2 Ves. & Beam.*, 184; *3 Johns. Ch.*, 424.)

II. If the papers on which the motion is founded be not insufficient in their character, they are too defective to allow the relief sought for by the defendant.

*1. The paper served as an affidavit is in form a petition. 272
Petitions must always be sworn to, and an exact copy with the jurat served. (*1 Hopk.*, 101; *3 Paige*, 280.)

2. If the paper is an affidavit, an exact copy, including the jurat, should be served; it should be governed by the rules relating to equity pleadings under oath. (*1 Hopk.*, 101; *3 Paige*, 280.)

3. It is entitled in the cause of complainant against Elmore and Hicks. It asks for relief in two causes, viz: complainant against Hicks and Elmore, and complainant against Elmore. This is entirely irregular. The relief sought for should have been confined to one cause, or the papers should have been entitled in both causes, or there should have been two sets of papers and two motions. No indictment would lie on this affidavit for any false swearing as to matters in the case of Elmore alone. (*2 Cowen*, 509; *Graham's Pr.*, 2d ed., 678.)

4. The notice for this motion is signed H. N. Walker, who is only solicitor in the case of Hicks and Elmore, and is entitled in that cause alone. It differs from the order to show cause. The notice rests upon *irregularity* alone.

5. *The order to show cause* is entered on motion of Douglass and Walker, who are not solicitors in the cause in which the papers and notice of motion is entitled. The order as entered is irregular, and if not a nullity should be vacated. None save the solicitors in a cause can make motions therein. (*Hopk.*, 369.)

III. The decree cannot be set aside for the want of proper evidence that defendant Elmore has a good and sufficient defense.

1. The affidavit and petition have none of the usual formula of an affidavit of merits.

2. It does not directly state that defendant has *merits*, but

Graham v. Elmore.

states it in such a manner as to leave it doubtful what he does mean.

273 *3. The affidavit misstates the effect of Hicks's answer; the answer really states that Hicks is a *bona fide* purchaser without notice; it alleges that he knew nothing of the representations made to complainants, but *believes* Elmore had authority.

4. Defendants have no defense under this answer, as the fraudulent representations are not in issue. It is a defense *independent* of them, and good, whether they were made or not. The defense arises from a distinct matter, and subsequent to Elmore's fraud.

5. The affidavit shows that Elmore's neglect to appear and answer, as required by the order and practice of the court, was the result of *deliberation* and *design*—a mode of defense selected as well calculated to embarrass complainants as a regular defense, according to the rules and orders of the court.

6. It appears that this was done by the advice of counsel. Hicks, it seems by his defense, is to defend Elmore, and Elmore to be saved the expenses of a solicitor. Elmore is to take the chances of successful defense by Hicks, and get rid of the debt and the trouble of litigation and its costs. If Hicks fails at the end of a protracted litigation, then Elmore seems to suppose he may come in, renew the fight, and take the chances of war. In the meantime, these two complainants are to stand and see these two defendants use up their goods without paying for them, and encounter the delays and losses and vexations of litigation. Will a court of equity listen to an affidavit of such a character as this? It would be a stain on the administration of justice.

IV. The cases of opening decrees are all limited to the opening the enrollment. After creditor's bill is filed, no such application has been or should be granted. (*6 Paige, 254.*) The affidavit of complainants shows that the order to answer is nearly out in the creditor's bill. The order to stay proceedings and show cause is served after defendant is on his examination to discover his property. After taking the chances of the first suit, he has taken all

Graham v. Elmore.

the chances of the second, to the time when he is about to be compelled to discover his property. If this motion be granted, its effects in other suits will be most *disastrous. 274 Defendants will lie by until called to answer or discover, when they will thus seek to come in, after a great lapse of time. In the meantime, their property will be either fairly or fraudulently disposed of, and the complainants will be thrown back to the filing of the bill, to fight a defendant who has thus managed to delay his proceedings and discover his strength.

V. If the decree, *pro confesso*, can be set aside after filing a creditor's bill, there is no sufficient ground for it shown on this application, either in the complainant's mode of proceeding, or in the merits disclosed by the defendant's affidavit.

It is objected, first: That the affidavit shows execution put in the sheriff's hands on the return day. Affidavit of complainants denies it; it was some days before the return. If it were not, no collusion is charged by defendants; without this charge, the return of the sheriff cannot be impeached. (2 Paige, 408.)

It is objected, second: That the decree against Elmore was entered up while the cause was not even at issue against Hicks: Answer, there is a decree, *pro confesso*, against Hicks, not yet opened.

Answer 2. That bill for fraud is like an action on the case at law, for a tort. There one defendant may suffer judgment by default, another may give a cognovit; one may be found not guilty by verdict, and the other guilty; in such case the tort is joint and several. So in this bill for fraud; there may be an order *pro confesso*, against one defendant, and a decree, while the cause may proceed against the other, who may have a decree in his favor. (Smith's Pr., 174, 175; 2 Paige, 102; 7 Johns. Ch., 194.) This bill is, in substance, an action on the case. Why wait, after an admission by Elmore of the fraud? (7 Paige, 448; 1 Peters, 80.)

VI. If either of the two last mentioned grounds are sufficient to set aside a decree after enrollment, it can only be on a bill of

Graham v. Elmore.

review, or on appeal. If there is error, the error is one of law. (*Cooper's Pl.*, 88-90.)

275 **H. N. Walker*, for Elmore.

1. The defense of one party avails his co-defendant, if the cause depends upon the same facts. (*1 Hoff. Pr.*, 554; *10 Johns. Rep.*, 534.)

2. A cause cannot be heard against several defendants in the absence of the rest, although no decree be asked against them. The bill must first be formally dismissed as to them. (*2 Paige*, 572; *1 Paige*, 548, 549; *5 Paige*, 638; *2 Johns. Ch.*, 614.)

THE CHANCELLOR—The principal question involved in this case is whether, where there are joint defendants, upon a *pro confesso* being obtained against one defendant, and before the cause is at issue, or in readiness for a hearing, against the other defendant, the complainant may enter a final decree, and issue execution against the party against whom the bill has been taken as confessed, and leave the cause to proceed against the other defendant or defendants. After a very careful examination, I have been unable to find any case in which this question has been distinctly presented. It is the uniform rule that a final decree, or an interlocutory decree which in a great measure decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the court. (*5 Wheaton*, 542.)

This rule is usually applied to cases where the com-

276 plaintiff *has not made proper parties to his bill, or where, the proper parties having been made to the bill, the complainant has not taken the necessary steps to bring them before the court; but does not the reason of the rule apply to a case like the present? The party who has answered in this cause, although as to that part of the bill which relates to Elmore alone he denies the allegations upon his knowledge and belief, has put in issue the whole merits of the bill.

Graham v. Elmore.

Before the cause is ready for a hearing, the complainant enters his final decree against the defendant who has not appeared, and issues his execution thereon for the full amount claimed, leaving the cause to proceed against the other defendant, before the parties, or rather before the merits of the cause are before the court, so as to enable it to make a final decree upon the whole case, when it may perhaps become the duty of the court, upon the hearing, to declare that the complainants have no equity whatever. I think the rule above stated goes to the extent that the court will not adjudge upon a part of the case in this way. It will not make a final decree until the cause is properly presented in such a form as will enable the court to make a final disposition of the cause, and do justice to all parties to the suit. In *2 Paige, 572, City Bank v. Bangs*, it is decided that where the defendants, or any of them, deny the allegations in the complainant's bill, or set up distinct facts in bar of his right to file the bill, he must file a replication, give rules to produce witnesses, and close the proofs before the cause is heard. It is settled that although a cause may be in readiness for a hearing against one defendant, when there are other defendants as to whom the cause is not in readiness, the defendant who has appeared and answered cannot notice the cause for a hearing, but must move to dismiss the bill for want of prosecution. (*Vermilyea v. Odell, 4 Paige, 122.*) This he cannot do if the cause is in such a situation that it may be noticed for a hearing by either party. This is confirmatory of the rule that the court will not grant a final decree until the cause is in readiness for a hearing as to all the parties.

It has been urged that the court cannot interfere in this way, *but that the defendant must be left to his 277 appeal or a bill of review. And this brings us to another objection to this form of proceeding. I do not see how an appeal can be taken in this stage of the cause. This case is still pending and proceeding in this court as against one defendant, while it may be proceeding in the appellate court, upon appeal, against the other defendant, if the appeal could be sustained by the

Graham v. Elmore.

supreme court. It would render the practice and proceedings anomalous and inconvenient if this court were to pursue this course and render final decrees, in succession, against several defendants in this way, as fast as the complainant should perfect his proceedings against each of the several defendants. A decree by default may be set aside on motion (*1 Hoffman's Pr.*, 419); and the court decides on motion, where the facts appear, and there is nothing to dispute about but the law of the case. (*Ib.*, 420.)

Some other questions were raised at the argument. It is objected that the order to show cause was entered on motion of Douglass and Walker, when H. N. Walker is the solicitor of record. The papers are signed and notices given by H. N. Walker, solicitor in the cause, and the order to show cause being granted on motion of Douglass and Walker is immaterial. The complainants could not have been misled, and the order would have been valid without the insertion of the name of any solicitor. The fact that the jurat annexed to the petition was not annexed to the copy served would prevent its being used as proof of the facts alleged in the petition, as the party is bound by the copy served. But the motion is founded upon the record and proceedings in the cause, as well as upon the petition, which disclose the facts in the same manner. The objection that the papers, being only entitled in the case of Elmore and Hicks, cannot be used in the case against Elmore alone, is technically correct, and the order must be confined to that case. But from the view I have taken that the decree taken against Elmore in the case of Elmore and Hicks was irregularly entered, and must be set aside, it must follow that all proceedings founded

278 upon that decree must fall with it. *After the defendant has omitted to make his defense, as has been the case here, I interfere in this way with reluctance. But the case being presented, I am bound to settle the practice of taking decrees against one of several defendants in this manner, either in one way or the other; and of the inconvenience and irregularity of this course of

Graham v. Elmore.

proceeding I entertain no doubt. The final decree entered in this cause against Elmore must be set aside and vacated, leaving the order taking the bill as confessed against him, of force, so that no obstacle may exist to taking a decree whenever the cause shall be in readiness for a final disposition; or if the complainant shall so elect, with leave to set aside the *pro confesso*, and require an answer.

Decree set aside.

McLean v. Barton.

Agnes McLean and others v. Jacob L. Barton and others.

Repeal of limitation acts. Whether by section three of the repealing act contained in the Revised Statutes of 1838 it was intended to continue in force the provisions of the acts of limitation repealed by that act, where the time had "begun to run," or whether the time prescribed in the Revised Statutes was intended as the period at the expiration of which the suits should be barred, *quære*. (a.)

Lapse of time, how taken advantage of. The statutes of limitation and lapse of time may be taken advantage of on demurrer. (b.)

Laches a bar to relief. Where the action was not commenced for upwards of twenty years after the right of action accrued, and no disability or excuse for the delay was pretended, or new discovery of facts suggested, and both the person charged with committing the fraud and his grantee were dead, the court refused to sustain the suit, by reason of the lapse of time, and held that the case could not be aided by proof of facts which were not put in issue by the pleadings. (c.)

A court of equity will lend its aid to detect and redress a fraud, notwithstanding the lapse of time; but when the fraud is discovered the parties must act upon that discovery within a reasonable time. The party seeking redress should not wait until all those who were cognizant of the transaction have paid the debt of nature, and until no one is left to deny or explain the allegations, unless satisfactory excuse can be given for the delay.

The bill in this case stated that in 1816 Robert Smart, now deceased, obtained by fraud a deed of conveyance of lots numbers 61 and 62 in section three in the city of Detroit, falsely representing himself to be the assignee of Catharine Bailey, the assignee of John Murphy, the assignee of David McLean, to whom the lots had been granted by the governor and judges of the Territory of Michigan, acting as a land board, but that the deed making said grant was not delivered by the governor and judges to said McLean.

(a.) Statutes of limitation are to be construed to operate prospectively only, unless the contrary intent clearly appears. *Harrison v. Metz*, 17 Mich., 377.

(b.) Followed in *Campau v. Chene*, 1 Mich., 400.

(c.) See *Campau v. Van Dyke*, 15 Mich., 371; *Disbrow v. Jones*, *supra*, 102, and cases cited in note.

McLean v. Barton.

The bill prayed for a conveyance of the lots to the complainants, the widow and legal representatives of David McLean.

The defendants put in a general demurrer.

A. D. Fraser, in support of the demurrer.

1. Agnes McLean, the widow of David McLean, has no apparent interest in the controversy, nor any equity as against the defendants or any of them, and therefore a general demurrer will lie to the whole bill. (*3 Paige*, 336.)

2. Under this demurrer, we rely on the statute of limitations *as a bar to any relief. "From the earliest ages, 280 courts of equity have refused their aid to those who have for an unreasonable length of time neglected to assert their claims, especially when the property in controversy has passed to subsequent purchasers. Although statutes of limitations do not extend to suits in chancery, yet courts of equity will acknowledge their obligation." (*5 Peters*, 470; *6 Ib.*, 71.)

The bar from lapse of time need not be set up by demurrer, answer or plea, but may be suggested at the hearing. (*1 Baldwin*, 418, 419.)

The statute of limitations may be urged as a bar of the remedy in the form of a demurrer. (*4 Wash.*, 639; *3 P. Wm's*, 287; *2 Mad. Ch.*, 246.)

In *1 Peters*, 360, and *3 Peters*, 44, the court say, "that the statute ought to receive such a construction as will effectuate the beneficial objects which it intended to accomplish—the security of titles and the quieting of possessions." (*7 Johns. Ch.*, 90, 122.)

And courts give effect to its regulations upon equitable titles. (*5 Mason*, 112; *2 Jac. and Wal.*, 137, 191; *1 Sch. and Lef.*, 413, 428.)

This suit should have been instituted within ten years from the fifth of November, 1829. (*Laws 1833*, pages 408, 409.)

Now, if David McLean ever had any rights, they accrued, as appears by the bill, on the execution of the deed by the gov-

McLean v. Barton.

ernor and judges to Smart, dated 5th November, 1816. No new right accrued to the party subsequent to that time.

3. It does not appear that McLean ever acquired title to the property, for it is expressly stated that the deed was never delivered.

4. It is not shown by the bill that McLean was entitled to a deed for a lot in Detroit. (*Laws 1820, page 14.*)

Backus and Seaman, contra.

If a demurrer is general to the whole bill, as in this case, *and there is any part either as to the relief or the discovery to which defendant ought to answer, the demurrer, being entire, must be overruled. (*Mif. Pl., 3d Am. ed., 214.*)

The deed executed by the governor and judges, and their assigning and designating the lots as lots to be deeded to McLean, was in pursuance of the statute of the United States, and of his assignment to them, and also in full payment for his lot, and was therefore for a valuable consideration, and though not good in law for want of delivery, was good in equity to pass an equitable title to the premises to McLean. (*Wadsworth v. Wendell, 5 Johns. Ch., 224.*)

We have alleged fraud on the part of Smart, and brought notice of the fraud home to the defendants, which vitiates and renders null and void the defendant's title. Equity grants relief not only against deeds, writings and solemn assurances, but also against judgments and decrees obtained by fraud and imposition. (*Reigal v. Wood, 1 Johns Ch., 402; Barnesly v. Powell, 1 Ves., 287; Heirs of Ware v. Brush, 1 McLean, 534-538.*)

282 *The statute of limitations of November 6th, 1829, on which the defendants rely to bar our action in ten years, was repealed April 6th, 1838, which repeal took effect August 31st, 1838. The second section of the repealing act, *R. S., page 697*, substituted the Revised Statutes, and the limitation therein provided. (*R. S., page 573, section 1.*) We come within the first section, within the twenty-five years.

McLean v. Barton.

The eighth section of Revised Statutes, page 575, does not subject us to the act of November 5th, 1829, because by the express terms of that section, "all causes of action accruing previous to the 31st day of August, 1838, shall be determined by the law under which such right of action accrued;" and our action accrued long prior to the passage of the act of November, 1839. (See *Tupper v. Tupper*, 3 *Ohio*, 387.)

*We do not deny the position that courts of equity will 283 carry into effect statutes of limitation (though they do not expressly apply to them) in all cases where the statute would be a bar at law, if an action at law was brought for the same subject matter. The decisions in 2*d Jacobs & Walker*, 191, 192; 7 *Johns. Ch.*, 114-126; 5 *Peters*, 470; 6 *Peters*, 71; are all put expressly upon the ground of the statute of limitations, and that the statute would be a bar to a recovery at law for the same subject matter.

A case cannot be found where mere lapse of time has been held a bar in equity, unless the lapse of time has been so great that the statute of limitations could be pleaded at law for the same subject matter, or a court of law would presume an extinguishment of the claim. Such was the express decision in 3 *Peer Williams*, 287; and such seems to have been the grounds of the decision in all the cases, and particularly that in 7 *Johns. Ch.*, 118, 122.

If the statute were a clear bar, and could be pleaded as such, it is possible the defendants might take advantage of it by demurrer; but they can take advantage of mere lapse of time, not coming within the statute of limitations, only on the hearing upon answer *as evidence that the plaintiffs' rights have 284 been extinguished by a conveyance. (14 *Peters*, 152.)

As to the lapse of time being presumptive evidence of the extinguishment of the plaintiffs' claims, see the case of *Livingston v. Livingston*, 4 *Johns. Ch.*, 287; such presumptive evidence plaintiffs have a right to rebut, which they would be precluded from doing if the lapse of time could be taken advantage of on

McLean v. Barton.

demurrer. The demurrer also admits the plaintiffs' claims and rights as stated in the bill; and the defendants are guilty of the inconsistency of admitting the plaintiffs' rights by the demurrer, and at the same time insisting that the lapse of time is presumptive evidence of an extinguishment of these very rights which are thus admitted.

Fraser, in reply.

It is incontrovertible that the legislature, by the provisions of the Revised Statutes, intended to reserve to suitors the benefits of the statutes of 1820 and 1829 and all rights accruing under them. (*Revised Laws*, page 575, secs. 7 and 8; *Laws of 1833*, 571, sec. 6; *Laws of 1833*, 408, 409.)

A reference to the provisions in regard to personal actions clearly manifests this intention. (*Revised Laws*, page 580, secs. 25, 27.)

And this view is fortified by the fact that the Revised Statutes are positive in their operation upon this subject, except so far as the old statutes are declared to be the governing rule as to past cases.

In putting a construction upon the provisions of the Revised Statutes, the court must compare all the parts of the statute, and the different statutes in *pari materia*, to ascertain the intention of the legislature. And may even recur to the situation and history of the country to ascertain the reason as well as the meaning of many of the provisions of a statute law.

It was clearly competent for the legislature to pass the act of 1829 now relied upon, and its provisions are reasonable and proper, expedient and just, and are fully sustained by the highest authorities. (8 *Mass.*, 430; 2 *Gallis.*, 141; 3 *Peters*, 290, 276; 5 *Ib.*, 464; 3 *Ib.*, 54.)

285 *But independent of the statute of limitations, which, it is insisted, constitutes a perfect bar here, this court will refuse its aid to those who have for an unreasonable length of time neglected to assert their rights, especially when the prop-

McLean v. Barton.

erty has passed to subsequent purchasers. (*10 Wheaton*, 152; *9 Peters*, 416.)

This court will not entertain stale or antiquated demands, nor encourage laches and negligence. (*1 Story on Equity*, 503, and notes.)

There is no time fixed when it operates in equity. (*Baldwin*, 419; *2 Sumner*, 212.)

It appears by the bill that the deed was never delivered by the governor and judges to the complainant's ancestor (McLean), and consequently no title vested in him in his lifetime. (*5 Mason*, 60; *12 Wend.*, 107, 108; *6 Cowen*, 619.)

THE CHANCELLOR.—This bill is filed to obtain the conveyance of lots Nos. 61 and 62 in section 3 in the city of Detroit.

The bill alleges that the lots in question were granted to David McLean by the governor and judges of the then Territory of Michigan, acting as a land board; but that the deed making said grant was not delivered.

That Robert Smart, now deceased, in December, 1816, obtained a deed of conveyance of the lots in question, representing himself as assignee of Catharine Bailey, assignee of John Murphy, assignee of said David McLean.

It denies that McLean ever made any such assignment, and avers that the representations of Smart to the governor and judges were made to deceive them and to defraud the complainants. The first question raised under the demurrer is the statute of limitations.

The statute of the 5th November, 1829, required all actions of this kind to be commenced within ten years from the passage of the act.

This act was repealed by the Revised Statutes, the repeal to take effect on the 31st day of August, 1838.

The statute of the 15th May, 1820, required all suits of this character to be commenced within twenty years. The suit in this case was commenced on the 14th May, 1840.

McLean v. Barton.

The existing law, section 1st, part 3d, title 6, Revised Statutes, provides *that "no person shall commence an action for the recovery of any lands, nor make any entry thereupon unless within 20 years after the right to make such entry, or bring such action, first accrued, or within twenty-five years after he or those from or under whom he claims, shall have been seized or possessed of the premises, except as hereinafter provided."

But by the 8th section of the same statute, it is provided that "where the cause or right of action or entry shall have accrued before the time when this chapter shall take effect as law, the same shall not be affected by this chapter, but all such causes of action shall be determined by the law, under which such right of action accrued."

The last section of the repealing act provides that "in any case where the limitation or period of time prescribed in any of the acts hereby repealed, for the acquiring any right or the barring any remedy, or for any other purpose, shall have *begun to run*, and the same or any similar limitation is prescribed in the Revised Statutes, the time of limitation shall continue to run and shall have the like effect as if the whole period had begun and ended under the operation of the Revised Statutes."

Whether this section intended to continue in force the provisions of the acts of limitation thereby repealed, where the time had "begun to run," or whether the time prescribed in the Revised Statutes was intended as the period at the expiration of which the suits shall be barred, is perhaps doubtful.

What time of limitation shall *continue to run*? I am inclined to the opinion, from the whole of the provisions of the statutes, that the intention of the legislature was to preserve the benefit of the statutes of limitation which were repealed. But whichever construction may be given will not, from the view I have taken of the case, change the result.

Whatever right David McLean possessed accrued in 1809. All of his right and title became vested in the present complain-

McLean v. Barton.

ants, upon his decease, and before the deed from the governor and judges to Smart in December, 1816. Their right of action then must have accrued at that time. No new or other right has since accrued.

There is no allegation of any disability or excuse made or attempted for the delay.

*The second ground urged upon the hearing is the pre- 287
sumption arising from the lapse of time.

There seems to be now no doubt that the statute of limitations may be taken advantage of upon demurrer; but whether the same rule holds in this case, there seems to have been much diversity of opinion. One of the earliest cases upon the subject is the case of *Deloraine v. Broune*, 3 *Brown C. C.*, 635. The authorities are there collected in a note to the case made by Lord Reddesdale. The same learned judge afterwards in commenting on this case in *Hovenden v. Lord Annesley*, 2 *Schoales & Lefroy*, 637, says: "In the case of *Lord Deloraine v. Broune*, an attempt was made to take advantage of the length of time by demurrer. The decision of that case as reported by Brown, does not convey much satisfaction to my mind; and perhaps the note which follows will account for the judgment of the court being delivered somewhat in a hurry. .

"The first judgment as reported is hardly intelligible, and then there is an explanation given next day; it is however, rather contrary to what Lord Kenyon determined in *Beckford v. Close*, which is cited in that case. This arose perhaps from Lord Thurlow not having, under the peculiar circumstances in which he stood, sufficiently considered that this was matter of the law of a court of equity. Lord Kenyon held that a demurrer to a bill, because it did not show a good title to redemption within twenty years, was a good demurrer. Why? Because it was a rule of the court that no redemption should be allowed after twenty years, and therefore the party should be put to bring his case within that rule. Lord Thurlow's opinion was given in a hurry; and many cases were then pending, in which much injury might have

McLean v. Barton.

arisen to the parties if the judgments had not then been given ; but it seems to me that Lord Kenyon's opinion was perfectly tenable on Lord Thurlow's own qualification ; that is, that when a party does not, by his bill, bring himself within the rule of the court, the other party may by demurrer demand judgment, whether he ought to be compelled to answer. If the case of the plaintiff as stated in the bill will not entitle him to a decree, the judgment of the court may be required by demurrer whether the defendant ought to be compelled to answer the bill ; that I take to be the matter of the law of a court of equity to be

288 decided *according to its rules and principles. However it is clear that in this case of *Lord Deloraine v. Browne*, Lord Thurlow was anxious that his overruling the demurrer should not be considered as deciding upon the case ; and the cause never came on again, Lord Deloraine being advised that the length of time was a bar."

In the case of *Cholmondeley v. Clinton*, 4 *Bligh*, 1, it is held that where there has been an adverse possession, not accounted for by some disability, for more than twenty years, a court of equity ought not to interfere.

In the case of *Tuttle v. Willson*, 10 *Ohio*, 26, it is said : " It is indeed well settled, that a statute of limitations will now be applied in equity where it would bar the claim at law. (1 *Story's Eq.*, 502 ; 2 *Story's Eq.*, 735 ; 6 *Peters*, 66.) The complainant filed her petition in 1838, a period of *twenty-three* years having elapsed after her cause of action arose, and, in our view, the statute is a bar to her claim. But if it were otherwise, the staleness of the demand would be fatal to its farther prosecution, and, independent of the act of limitation, affords a complete defense. Where rights are unreasonably neglected, the presumption is legitimate of an intention to abandon them. 'Nothing,' says Lord Camden in *Smith v. Clay*, 3 *Brown Ch. Cases*, 640, 'can call forth this court into activity, but *conscience*, good faith and reasonable *diligence*: where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced, and

McLean v. Barton.

therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court.'

"This language of Lord Camden is cited with approbation by the supreme court of the United States. (9 *Peters*, 416.) In 7 *Ohio*, 62, the same principle is also recognized by this court."

Demurrers have been uniformly allowed to bills to redeem after the lapse of 20 years.

In the case of *Hovenden v. Lord Annesley*, before mentioned, Lord Reddesdale says:

"This brings me to consider the case finally in another point of view, supposing the plaintiff might have had relief on the ground of fraud, if he had pursued his title with due diligence, the answer is, it appears that the alleged fraud was discovered by the party at *least so long ago, that, in 1735, a bill was filed, 289 imputing fraud, and impeaching the transaction on the same ground. Therefore, the position that fraud is not within the statute, because it is a secret thing, which cannot be discovered, is not applicable to this case; for the fraud imputed in this case is represented in the bill of 1735; that is, it is there stated that the release was a release which the party conceived he had a right to impeach on the ground of fraud, and for that purpose to obtain from the opposite party a discovery of all the facts and circumstances demonstrating the fraud. This was known to the person claiming in 1735. Therefore, whatever right of action might have accrued on discovering any particulars of the fraud different from what were apparent in 1726, must be taken to have accrued in 1735; but was not pursued in 1794, a period of near sixty years after the first bill filed. I hold it utterly impossible for the court to act in such a case. A court of equity is not to impeach a transaction on the ground of fraud, where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down, that every right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years."

McLean v. Barton.

That the presumption arising from lapse of time may be taken advantage of upon demurrer, is settled also in the case of *Livingston v. Livingston*, 4 Johns. Ch., 299; where Chancellor Kent says: "The difference between this case and the one decided yesterday is very material; here is a demurrer to the whole bill, and the great lapse of time taken as one ground in support of it, whereas in the other case the defendant, by his answer, admitted the covenants to pay and put his defense on counter claims." And effect was given to this defense under the demurrer. The bar from lapse of time is a conclusion from acquiescence, an inference from facts, which need not be set up by demurrer, answer or plea. (1 Baldwin, 418.)

Where there are such conflicting authorities, I feel myself at liberty to adopt the rule that appears to me the most reasonable and convenient. What is the case now presented to the court? Here has passed by a period of upwards of twenty-three years. No disability or excuse for this delay pretended; no new discovery of fraud suggested.

290 *The parties lie by, until, as appears from the bill, Smart, the party charged with having committed the fraud, is dead. Campbell, his grantee, is also dead. No one is left to answer these charges. If the lapse of time ought to bar this stale claim, I see no reason or propriety in compelling these parties further to pursue this litigation. If any disabilities existed, it would have been easy to have stated them. If fraud has been recently discovered, it should have been so alleged.

And this allegation not having been made, the case cannot be aided by proof, for the proof to be admissible must be founded on some allegation in the bill and answer. (1 McLean's Rep., 489.)

A court of equity will lend its aid to detect and redress a fraud, notwithstanding the lapse of time, but when the fraud is discovered, the parties must act upon that discovery within a reasonable time. The party seeking redress should not wait for a period

McLean v. Barton.

of between twenty-three and twenty-four years, until all those who were cognizant of the transaction shall have paid the debt of nature, and no one is left to deny or explain the allegation, without giving any excuse for this delay.

Demurrer allowed.

Brown v. Gardner.

William Brown v. Solomon Gardner and others.

Injunction against public officers. The ground on which equity interferes to restrain public officers who are acting illegally, is to prevent great and irreparable mischief. It will not interfere if the injury is slight or doubtful.

Where a bill was filed and preliminary injunction obtained to restrain commissioners of highways from laying out a highway through the orchard and garden of complainant in violation of the statute, and it appeared that the road was actually opened before defendants had notice of the injunction, the bill was dismissed.

Jurisdiction for one purpose retained for another. The court, being satisfied that the defendants had acted in good faith in laying out the road, refused to retain the bill for the purpose of giving damages to complainant. (α.)

Bill filed March 5, 1839, for an injunction to restrain the defendants from laying out and working a highway.

The bill states that the complainant is owner and possessed of certain messuages or farms in the town of Cottrelville, county of St. Clair; that he has improved and cultivated said farms for many years past; that he has a garden on one of said farms which he has cultivated for more than twenty years, all of which time it has been used exclusively for that purpose; that he has a garden on the other of said farms, which he has prepared and cultivated for more than a year past; that there is a grove of maple trees on one of the farms which he has cultivated and used for a sugar orchard; that he has also an orchard on one of the farms of more than the growth of four years.

That in the month of August, 1838, defendants, who are commissioners of highways of Cottrelville, proceeded to lay out a road upon and across complainant's farms and through said gardens and orchards; that complainant forbid the laying out and

(α.) As to retaining the case for an assessment of damages when the principal relief sought is denied, see *Carroll v. Rice*, Wal. Ch., 573; *Hawkins v. Clermont*, 15 Mich., 511; *Whipple v. Farrar*, 3 Mich., 436.

Brown v. Gardner.

working said road, and denied the right of defendants to lay out or open the same.

States that the commissioners of highways have ordered the overseers of highways to cause the highway so laid out to be worked and opened. *That in the month of February, 1839, they actually commenced working the road, and to open the same through the said farms, orchards and gardens.

The bill charges that defendants did not pursue the course pointed out by the statute in laying out said highway. Charges that the necessity of said road was not certified by twelve respectable freeholders sworn by an officer duly authorized to administer oaths. Also that the jury was not duly summoned and drawn, and free from all legal exceptions, and were not duly sworn by an officer authorized to administer oaths, to assess complainant's damages, and that the jury assessed no damages to complainant. Also, that the road would be more than two hundred dollars damages to complainant, if worked through his orchards, gardens, etc., and that the damages in destroying his shade trees, etc., would be irreparable.

The bill prays for injunction, and that defendants pay damages and costs of complainant.

The answer states that defendants were duly elected and qualified as commissioners of highways for the said township of Cottrelville, that defendant Ward was also county surveyor, that they had full and lawful authority to lay out said road. Admits complainant is possessed and owner of the messuages and farms, and that he has cultivated the same for many years past. States that in consequence of the old road becoming impassable, owing to its having been washed away by the water, it became necessary to lay out and establish a new road in said town. That the old road was duly and legally discontinued, and application having been made by twelve respectable freeholders of said township, certifying upon oath that such road was necessary, defendants, as commissioners, ordered and directed a new road to be opened, laid out and established, which necessarily

Brown v. Gardner.

crossed the farms of said complainant in the bill alluded to. That the order was made and entered on or about the twenty-first day of August, 1838.

That in November, defendants gave complainant notice to remove his fences, etc., which he neglected to do, that defendants then directed the fences to be removed and road to be opened.

That before doing so they applied to David Cottrell, Esq.,

293 a justice of the peace of *said township, to obtain a jury to assess plaintiff's damages. That the justice issued his warrant to a constable of the township of Clay to summon nine jurors in a township other than Cottrellville to assess complainant's damages; that complainant had due notice of the time and place, and attended; that on or about the third day of March, 1839, the said justice drew by lot six jurors; that they were *duly sworn* to assess the damages, and after having viewed and examined the premises they returned a verdict that complainant was entitled to no damages, which verdict was certified by the justice and delivered by him to defendants.

The answer further states that after the verdict of the jury, defendants offered complainant twenty-five dollars for his damages, which he refused; that complainant appeared before the jury and claimed a much higher sum.

The answer denies that the new road goes through any orchard on the premises of complainant of the growth of four years, or through any garden that has been cultivated four years or more.

Admits that on a small portion on front of one of said farms which has never been under any inclosure, but forms a part of a large field on the site of said road, the complainant or his tenants might, on two or three occasions, and not oftener, as defendants have been informed, etc., have raised a few potatoes and other vegetables, etc., but denies that it was then or ever has been exclusively occupied as a garden.

Denies that there is any orchard or garden on the site of the new road, but admits that the new road passes through a grove of maple trees on one of said farms.

Brown v. Gardner.

Admits that complainant forbid defendants, and denied their right to lay out said road.

States that before the service of the injunction, or any knowledge thereof, the road had been opened; that the only damage done was the cutting down of several of the maple trees.

The case was brought to a hearing on pleadings and proofs.

Harrington and Emmons, for complainant.

*1. The court of chancery has undoubted jurisdiction 294 where public officers are proceeding illegally and improperly under a claim of right to injure the property of individuals, to restrain them from proceeding by injunction. (*Cooper v. Alden*, ante, 96; *Devaux v. City of Detroit*, ante, 98; 6 *Paige*, 83; *Ib.*, 262.)

The statute (Laws of 1833, page 108, sec. 16) provides that it shall not be lawful for the commissioners of highways to lay out any road through any orchard or garden without the consent of the owner thereof, if such orchard shall be of the growth of four years, or such garden shall have been cultivated as such at least four years before such highway or road shall be laid out.

The Revised Statutes of 1838 (page 121, sec. 4) contains the same provision.

The bill states that the commissioners of highways of the town of Cottrelville were proceeding to lay out and open a road or highway through complainant's garden, which he had cultivated as such for more than twenty years, all of which time it had been used exclusively for that purpose; also through an orchard of more than four years' growth.

This allegation clearly gave the court of chancery jurisdiction, and it properly exercised that jurisdiction in granting the injunction to restrain the opening of the road through complainant's orchards and gardens.

2. Where the jurisdiction of the court of chancery has once rightfully attached, and the equity which gave the jurisdiction has subsequently been defeated or destroyed, the court will retain its

Brown v. Gardner.

jurisdiction and do justice in the premises, although there may be an adequate remedy at law. (*1 Johns. Ch.*, 131; *2 Story's Eq.*, 104-109; *1 Fonbl. Eq.*, "59" note (2), and authorities there cited.)

3. The jurisdiction of this court in the premises is conceded; and the complainant has waived no right to ask relief in this court.

First. The objection to the jurisdiction of the court, that the complainant has an adequate remedy at law, should be made by plea or demurrer, or should be distinctly stated in the answer. (*Winwall v. Hall*, 3 Paige, 313.) No such objection is made by the answer in this case. (See also 4 Paige, 399.)

295 **Second.* The complainant has waived no right to ask relief in this court.

There is an express averment in the bill which is admitted by the answer that the complainant never gave his assent, but *always remonstrated* against the laying out and working of the road, and denied the right of the defendants so to do.

296 *Did the appearance of the complainant before the jury, when notified by the commissioners to appear, waive by *implication* a right, which he positively, expressly, and at all times insisted upon, as admitted by the answer?

The *commissioners* are the sole judges of the necessity or propriety of laying out the road. The province of the *jury* is to judge only of the amount of damages. Suppose the complainant had objected to their assessing the damages, such objection would have availed nothing, for they had no power to judge of the necessity or propriety of laying out the road. The jury cannot lawfully decide that there shall be no road when the commissioners have determined there shall be one. (*11 Pick. Rep.*, 269.)

It was also held in the case of *Hinckley et al.*, 15 Pick., 447, that the appearance of the town, before the jury ordered by the commissioners to assess damages, was not a waiver by the town of the objection that they had not notice. And the reason given in that case is that the jury could not have acted upon such objection.

Brown v. Gardner.

A. D. Fraser, for defendants,

1. Contended that this court had no jurisdiction of the case; that the statute (*R. S.*, 125, *sec.* 30) gives a remedy to a party who conceives himself aggrieved, by an appeal, and that where the statute provides a remedy this court will not interfere. (*7 Paige*, 155; *19 Ves.*, 448; *6 Wend.*, 566; *4 Cow.*, 202; *3 Paige*, 573; *1 Ib.*, 114; *10 Wend.*, 174.)

2. As to what constitutes an orchard within the meaning of the statute, see *23 Wend.*, 360.

3. The evidence on the part of the complainant is not sufficient to outweigh the answer of the defendants and their testimony. It is the province of the chancellor to weigh the testimony and decide upon it. (See *1 Bailey's Rep.*, 386; *Ib.*, 514.) But even if the allegations in the bill were well founded, it is shown that the complainant waived all objections on that ground by preferring his claim for damages. (See *1 Cowp.*, 410; *2 Chitt. Ch. Dig.*, 1342-1344; *2 Hill Ch.*, 7; *Ib.*, 416.)

4. Chancery will not, except under particular circumstances, as there may be upon a bill for a specific performance of a contract, direct an issue or a reference to ascertain damages. (*17 Ves.*, 277, 278; *14 Ib.*, 128; *Fonbl. Eq.*, 59; *2 Story's Eq.*, 107, 109.)

The cases of *Denton v. Stuart*, *1 Cox*, 258, and *Greenaway v. Adams*, *12 Ves.*, 395, are overruled so far as the principles there laid down are not reconciled with the case in *17 Ves.*, 277, 278.

In a case where it would be difficult to ascertain the injury resulting from the breach of a contract or the sum in damages by which the injury might be compensated, this court will not themselves ascertain the injury nor the damages, nor direct an issue *quantum damnificatus*. (*9 Cranch*, 456; *2 Story's Eq.*, 104-109; *4 Johns. Ch.*, 560; *Ib.*, 195; *1 Cow.*, 755; *14 Ves.*, 129; *17 Ib.*, 278-285; *1 Sch. and Lefroy*, 25; *5 Johns. Ch.*, 194, 195; *3 Meriv.*, 248; *4 Johns. Ch.*, 560.)

THE CHANCELLOR.—The bill in this case was filed to restrain the defendants, commissioners of highways for the township of

Brown v. Gardner.

Cottrelville, from opening a highway through premises, a part of which the complainant alleges had been used for a garden for some twenty years, and a part as an orchard of more than four years' growth.

The bill was filed under the provisions of the statute inhibiting any road from being laid out without the consent of the owner through any orchard of more than four years' growth, or garden which had been occupied as such more than four years before the laying out of such road.

The answer of the defendants, inhabitants and officers of said town, expressly denies that the said road was laid out or opened through any such garden or orchard. Proofs on both sides have been taken.

It is singular that in relation to a matter of fact which
298 from its very *nature we would suppose must be apparent one way or the other, we should meet with such direct contradiction as is found in the bill and the answer.

The proof, however, to some extent, but not altogether, explains it. I shall not undertake to go through with the entire mass of testimony taken in this cause. With regard to what is called in the evidence the lower farm, it does not seem to me that the road can be considered as passing through an orchard of more than four years' growth within the meaning of the act.

The statute must receive a reasonable construction. The object of it was to protect orchards from being cut up and severed without the consent of the owner. But one small tree and one broken stump, and those as it would seem of less than four years' growth when the road was laid out, and detached from the trees in an orchard adjoining, were included in the road.

There is some evidence of an intention to continue the appropriation of this ground for the purpose of an orchard. But where the fact is one of so doubtful a character, and the injury so slight, it does not seem to me that the court for this cause is authorized to retain this suit, and close up this road which has been laid out, made and fenced, or award an issue *quantum damnificatus*.

Brown v. Gardner.

As to the garden on the upper farm there is somewhat more difficulty. Many respectable witnesses residing in the immediate vicinity say that the grounds in question have not been used for a garden. Others swear positively that they have been so used for several years. I am inclined to think, after a careful examination of the testimony, that the new road does encroach some thirty feet in the widest place upon what the last witnesses mean when they speak of a garden.

Some culinary vegetables have been raised on different portions of this piece of ground for many years; whether it has been so used every year is very doubtful. The same portions of the ground do not seem to have been occupied for these purposes each year. And from the testimony it would seem not to have been very carefully cultivated, or to have produced much. And this explains the testimony of those witnesses residing in the immediate neighborhood, who testify that the road does not pass through any garden. From the manner in which this ground has been used, the manner in which it was found, *or rather 299 from the fact that during a portion of the time it has been partially without a fence, it is doubtful whether it can be called a garden within the meaning of the act. It would appear that it was not regularly inclosed, and set apart as a garden. But admitting that by possibility it may be regarded as a garden, within the meaning of the act, does this present such a case as calls upon this court to interfere, when if the complainant is entitled to any remedy, the courts of law can afford the same relief which is now sought here? The injury, if any, is very slight. Some of the witnesses say that the complainant has sustained no injury; all place the damages at a small sum. The jury who were impaneled to assess the damages found that the complainant would sustain no injury.

The jurisdiction of this court to interfere, and restrain public officers who are acting illegally to the manifest injury of others, is well settled. But the grounds on which this court interferes in such cases is to prevent great or irreparable injury. Such is not

Brown v. Gardner.

the case here. The road was laid out and opened before the service of the injunction. There is nothing in the case from which to infer that the commissioners acted in bad faith or intended any wanton violation of the rights of the complainant. The indispensable necessity for a change in the locality of this road is established. I find no evidence of unfairness or partiality in the summoning, or the conduct of the jury summoned to assess the damages. But it is argued that as the court has acquired jurisdiction for the purpose of granting the injunction, it should retain it for the purpose of giving damages to the complainant. It would be competent for this court so to do. It is sometimes done. In a clear case of gross and wanton injury by public officers, under color of their office, if the purposes of justice would be better subserved than by sending the complainant to a court of law, I should be disposed to do so. But in a case like this, when the officers seem to have acted in good faith, when it is doubtful whether any trespass has been committed, and when, if it should be so found, the damages, if any, must be very trifling, and a court of law can afford the complainant an adequate remedy, I do not think this court is called upon to keep these defendants here, and send an issue to the county of St. Clair, first to try the fact whether the land in question was a garden or not, and then, if so found, to assess the damages.

300 *The convenient administration of justice will be better subserved by leaving the complainant to his suit at law in the county where the lands are situated, and where the witnesses reside.

Bill dismissed.

Jones v. Wing and Dean.

Whitney Jones v. Wing and Dean.

Denials by answer, how made. Where an allegation is made in the bill with divers circumstances, the defendant should not by his answer deny the allegation literally as laid in the bill, but should answer the point of substance positively and certainly.

Fraud, setting aside contract for. A stock of goods was exchanged by complainant for land, which defendants represented to be pine lands, having a certain large quantity of pine timber standing thereon. Complainant had never seen the land, and relied upon these representations. It turned out that there was pine on but about one-fourth of the land, and on that only about half the quantity represented. The court decreed the contract rescinded, that the unsold portion of the goods be re-delivered to complainant, and that he be paid for those sold, and have a lien on the land as security until the payment was made. (a.)

False representations: Scienter. Where the representations on which a party relies are untrue, it is immaterial whether the party making them knows them to be so or not; the effect upon him being the same in either case. (b.)

Bill to rescind a contract on the ground of fraud. The statement of the case is sufficiently given in the opinion of the court.

Pratt and Lee, for complainant.

The conduct of the parties shows the merits of the case. The complainant, so soon as he saw the lands, told the witness, Lyon, that he had been cheated, and would have redress, and immediately on his return to Marshall, and meeting the defendant, Dean, he asserted his rights, declared himself to have been injured, and that he should apply to the laws for redress.

This he has done, and what is the duty of this court?

No complex questions of artificial rights at law arise to interfere with the direct application of the principles of equity. The jurisdiction of the court is unquestioned; equity will always take

(a.) For another case of setting aside a land purchase for fraudulent representations, see *Rood v. Chapin*, Wal. Ch., 79.

(b.) See *Converse v. Blumrich*, 14 Mich., 109; *Beebee v. Young*, 14 Mich., 186; *Tong v. Marvin*, 15 Mich., 60; *Comstock v. Smith*, 20 Mich., 338.

Jones v. Wing and Dean.

cognizance of fraud, and grant relief where it is proven to exist. The peculiar and special power of the court is also properly invoked in compelling an account of the property received, and a canceling of the conveyance to the complainant.

The fraud in this case was in a material point; the complainant *trusted to it and was misled. He is therefore entitled to relief. (6 Ves., 173; 1 Bro. Ch., 546; Jacob's Rep., 178; 1 Fonbl. Eq. B., 1 Ch., 228; 1 Story Eq., 201.)

Whether the defendants knew their representations to be false, or made the assertions without knowing whether they were true or false, is immaterial, for the affirmation of what one does not know or believe to be true, is equally in morals and in law as unjustifiable as the affirmation of what he knows to be positively false. (Ainslee v. Medlycott, 9 Ves., 21; Graves v. White, Freem., 57; Pearson v. Morgan, 2 Bro. Ch., 389.) And even if the party innocently misrepresents a fact by mistake it is equally conclusive; for it operates as a surprise and imposition on the other party. (2 Bro. Ch. R., 389; 10 Ves., 475; 1 Ves. and B., 355; 3 Ves. and B., 111.)

Fraud and damage coupled together will entitle the injured party to relief in any court of justice. (7 Johns. Ch., 201.)

Geo. Woodruff, for defendants.

303 *If the representations of the defendants were not fraudulent, then the bill is not sustainable. If what the defendants said is consistent with a mistaken judgment as to the quantity of pine and a water power, and a fraudulent intent and act is not *clearly proved*, the complaint is not made out, and no rule of equity can be shown which will relieve the complainant from making out a clear case of positive fraud in this case.

The statement must be of fact and not of opinion. (1 Story's Eq., 206.).

THE CHANCELLOR.—The bill in this case charges that
304 the complainant *(a resident of New York) on the 1st of

October, 1839, had at Marshall, in this State, a large quantity of goods.

That Wing and Dean (the defendants) were then merchants at Marshall, and that the complainant intrusted a part of the goods to them to be sold on his account.

That they proposed to buy the goods of the complainant, and pay for them in lands in the county of Clinton, and with a view to induce the complainant to take the lands, made to him the following representations: That of the one thousand two hundred acres, the northern six hundred and forty acres were the most valuable pine lands in the State; that they would average from seventy to ninety trees per acre, and those from two and a half to five feet in diameter. That they had actual knowledge of the quality of the lands from their own examinations, and that they would warrant there were forty trees per acre on the six hundred and forty acres. And that they also stated that there was a good mill site, by which a fall of six or eight feet could be obtained on Maple river.

The sale was consummated on the eighteenth of December; the complainant soon after went to examine the lands, when he found, as is alleged, that out of the six hundred and forty acres there was not more than one hundred and fifteen acres of pine timber.

The complainant returned to Marshall in the month of February following, and saw the defendant Dean, to whom he immediately represented that he had been defrauded, and demanded restitution, which was refused.

The principal point in the case is as to the representations made respecting the quality of the lands.

The answer of the defendants admits the sale of the goods for the consideration stated in the bill. They deny that they represented the six hundred and forty acres as the most valuable pine lands in the State, and that they would average from seventy to ninety trees per acre, and that they would warrant there were forty pine trees to the acre, from two and a half to five feet in diameter, on the whole six hundred and forty acres. It is proper

Jones v. Wing and Dean.

here to say, that the answer in this respect is not entirely satisfactory. If an allegation is made with divers circumstances, the defendant should not deny it literally as laid 305 in *the bill, but should answer the point of substance positively and certainly.

The defendants in their answer further say, that of the eight lots they stated that four certainly had pine timber on them, on another they thought there was pine, but were not sure; that they had examined five, perhaps six, of the lots the summer before, but had not examined the other two. That in December, 1839, they told the complainant in the presence of Samuel Camp and R. B. White, that, as they thought, there were forty pine trees on an acre on the land where the pine grew. There are other allegations in the bill, which are totally denied. There is a great discrepancy between the bill and the answer, and we are compelled to resort to the testimony, to ascertain the character of the representations concerning the land which is the principal subject of controversy.

The answer of the defendants refers to statements made in the presence of White and Samuel Camp. Mr. Camp says "that Mr. Dean stated that that land of theirs up north would average from sixty to ninety pine trees per acre, from two and a half to five feet through, and from sixty to ninety feet to the limbs; and this conversation was had but a day or two before the bargain was consummated." This testimony is substantially corroborated by that of White, and in some respects the testimony of White is still stronger. On being asked what proportion of the lots did Wing and Dean represent as having pine on them, he replied that the expression was unqualified; and it was that the pine lands would have from sixty to ninety trees to the acre; and one of the defendants said he thought he would not be afraid to warrant forty trees to the acre. On being asked if the defendant referred to the whole or a part, says he did not refer to any particular part.

The testimony of George E. Savage alone sustains to some

extent the ground taken in the answers. He left Marshall some time before the conversation referred to by Camp and White, and before the bargain was closed. He was examined a long time after the transaction took place. But admitting his testimony to be substantially true, if the testimony of Samuel Camp, White, and Hermon Camp of subsequent conversations is also taken as true (and I do not see how it can be avoided), it would not change the result.

*The testimony of Hermon Camp of the conversation 306 which took place at the time of the delivery of the deed is important. At this time, it would appear by the testimony of this witness, the defendants assured the complainant that there were six hundred and forty acres of good pine land, which would average forty trees to the acre. He further states that Jones said he had never been on the land, and that he depended on the statement of the defendants.

There can be no doubt that the lands turned out to be very different from such lands as the complainant would naturally have been led to expect from these representations. The witnesses vary somewhat as to the quantity of pine lands. One of the witnesses states that there may be in all one hundred and seventy acres of pine, but of a quality inferior to the representations. Another from one hundred and eighty to one hundred and eighty-five, averaging from eighteen to twenty-two trees to the acre. Another witness states the quantity at sixty acres of good pine. The other witness, Lyon, says there may be one hundred acres of pretty fair pine land, averaging about twenty trees to the acre.

It would seem that but about one-fourth of the land has pine timber upon it, and upon this not much more than half the quantity which the complainant would have been led to expect from the representations made; and the complainant was a stranger, who had not seen the lands, and who relied upon the representations of the defendants. Whether these representations were made knowing that they were untrue, or were made without knowing whether they were true or false, the effect upon the com-

Jones v. Wing and Dean.

plainant is the same, and the consequence which must follow must be the same,

The complainant, as appears from the case, trusted to them and was misled. Some other points were made in the case, but as their consideration cannot vary the result, it is not necessary further to refer to them.

The only doubt I have had in the case has resulted from a slight degree of suspicion from the great degree of confidence which seems to have been reposed in the defendants by the complainant, that he may have seemed to rely on these representations, with a view to a resort to this mode of redress; but there is not sufficient shown in the case to authorize this conclu-

307 sion, and I think it is not so; and *there is no alternative left to the court but to declare the contract rescinded, and to decree a re-delivery of the remaining portion of the goods to the complainant, and award the re-payment to him of the value of the goods which have been sold by the defendants, and to decree that until this payment shall be made he shall retain his lien upon the lands as a security for the amount due him for the goods which have been sold.

Decree accordingly.

Wales v. The Bank of Michigan.

Austin Wales v. The Bank of Michigan.

Officers of bank, powers of. Where a note is made payable at a bank, it is within the ordinary scope of the powers of the bank officers to receive other notes as collateral, on the understanding that they should be placed in the bank for collection, and that when a sufficient amount should be collected thereon for the purpose it should satisfy the first note. (a.)

Relief against judgment. Where a party is ignorant of the facts which constitute a defense at law until after judgment is rendered against him, he may have relief in equity. (b.)

The bill in this case states that complainant indorsed for the sole benefit and accommodation of one Wessel Whitaker, a note made by him dated July 5th, 1837, payable ninety days after date to the order of E. T. Clark and Isaac O. Adams, at the Bank of Michigan, for the sum of \$1,000. That the note was indorsed by Clark & Adams as first indorsers, and Whitaker delivered to complainant, to secure the complainant for indorsing, one note for \$600 or thereabouts, and another note for \$1,391.36, with authority to collect a sufficient amount on these notes to indemnify complainant for his indorsement. That this agreement was communicated to E. P. Hastings, President of the Bank of Michigan; and the notes were placed in his hands to be so collected and applied. Complainant was sued on his indorsement, and May 1st, 1839, judgment was rendered against him for \$1,131.21, and *fi. fa.* was issued thereon. That after the *fi. fa.* had been issued, upon inquiry at the bank, complainant ascertained that the note for \$600 had

(a.) As to the powers of bank officers in general, see *Farmers' and Mechanics' Bank v. Troy City Bank*, 1 Doug. Mich., 457; *Kimball v. Cleveland*, 4 Mich., 606; *Peninsular Bank v. Hanmer*, 14 Mich., 208.

(b.) See *Wright v. King*, *ante*, 12; *Mack v. Doty*, *post*, 306; *Burpee v. Smith*, Wal. Ch., 327; *Wixom v. Davis*, Wal. Ch., 15; *Roberts v. Miles*, 12 Mich., 297, for other cases in which have been considered the circumstances under which equity will give relief to a party after judgment against him at law. And as to the granting by a court of equity of a new trial at law, see *Morris v. Hadley*, 9 Mich., 278.

Wales v. The Bank of Michigan.

been collected, and the amount had not been applied. That the bank had let Theodore Romeyn have the \$1,391.36 note, and had taken from him an agreement to pay the amount due thereon in sixty days, to which agreement complainant never assented.

The bill prayed for a perpetual injunction, and for a release and discharge of the judgment against complainant, and for other relief.

To this bill the defendants demurred.

309 **Joy & Porter*, in support of demurrer, cited 6 *Peters*, 51; 1 *Johns. Ch.*, 49, 320, 465; 2 *Ib.*, 228.

D. Goodwin, *contra*, cited 5 *Peters*, 99.

THE CHANCELLOR.—The grounds taken in support of the demurrer are these:

1. That Mr. Hastings, then president of the bank, was acting as the agent of Wales, and not in behalf of the bank.

The question now presented is upon demurrer, by which the allegations in the bill for the purpose of this decision must be taken to be true.

The allegation is, that the notes which were held as collateral security "were placed by the complainant in the bank with the said president thereof, to be by the said president, directors and company used, held, collected and applied as before mentioned; that is, for the purpose of paying the note of Whitaker, of which Wales was indorser.

It further appears that one of the notes of about \$600, so deposited, has been collected, and that the proceeds have not been applied to the payment of the note indorsed by Wales.

That the other note has been given up by the then president of the bank, upon the undertaking of another individual to pay to the bank the amount of Whitaker's note, upon which Wales was indorser.

Under these allegations, uncontradicted, it would seem that these securities have been treated throughout as a part of the security upon which the bank relied for the payment of this note,

Wales v. The Bank of Michigan.

and that it comes fairly within the scope of the powers of the officers of the bank; it was one of the most ordinary transactions, to wit, taking security for a debt.

The fact that one of the notes has been collected and the proceeds not applied as was agreed, and that the bank is still proceeding to collect the entire judgment, must be fatal to a general demurrer, unless it can be sustained on other grounds.

2. The other ground in support of the demurrer is that this complainant comes too late. That he should have made his defense at law.

*The rule on this subject is very rigid, and should be 310 adhered to. But this seems to me to come within the excepted cases.

The rule laid down in *Lansing v. Eddy*, 1 Johns. Ch., 51, is stated by Chancellor Kent to be, that this court will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defense. This relief is often also refused where the party has been guilty of negligence.

The allegation here is that the complainant confidently relied and expected the defendant would collect and apply the proceeds of these notes to the payment of the note of Whitaker, on which he was indorser, and did not know or suspect he had any legal defense until after the judgment was rendered, when he for the first time learned that one of the notes had been collected, but the proceeds had not been applied; and that the other had been transferred upon the understanding of a third person to pay this identical note, upon which the judgment is rendered against him as indorser.

The circumstances were well calculated to lull the complainant into security. But for these transactions of the defendants, there was no defense to the note; of these he knew nothing until after the judgment was rendered, the complainant relying, as he says, that the money would be collected upon the collateral notes to pay off this liability.

The demurrer must be overruled with leave to answer.

Demurrer overruled.

 Freeman v. Michigan State Bank.

Harrington.
1 h 311
108 233
1 h 311
96 294

John Freeman v. The Michigan State Bank.

Amendment of plea. In an application to amend the defendant's pleading, the proposed amendments should be set out. (a.)

A plea may be allowed to be amended for the purpose of placing before the court an additional fact unknown to the defendant when the plea was filed, and consistent with the defense then made. But it will not be permitted for the purpose of setting up a fact or state of facts inconsistent with the original defense.

This was a motion for leave to amend a plea. The motion was based upon an affidavit, setting up certain facts which had come to the knowledge of the defendant's officers after the original plea had been filed in the cause, and which it was proposed to incorporate therein. The proposed amendment was set out in the application.

Joy & Porter, for the application, cited *Story's Eq. Pl.*, secs. 701, 895, 896, 897, 902, 903; *13 Ves.*, 438.

312 **H. H. Emmons*, *contra*, denied that this was a proper case for amendment. Pleas are only allowed to be amended in case of surprise, mistake or inadvertence; not to meet facts which defendant claims not to have known, but which he might have known had he been sufficiently diligent. He cited *Story's Eq. Pl.*, secs. 701, 896; *1 Hoff. Ch. Pr.*, 226; *Cooper's Eq. Pl.*, 336, 337.

313 **THE CHANCELLOR*.—Leave to amend is usually based upon mistake, inadvertence, etc.

In this case it is sworn in the affidavit, that the additional fact which it is desired to present to the court by this amendment, was unknown at the time of filing this plea.

Courts have always been rigid in requiring that amendments of

(a.) See *Mason v Detroit City Bank*, *ante*, 222; *Graves v. Niles*, *post*, 332.

this kind should be stated in the application, and a defendant will not usually be permitted to set up a fact or a state of facts inconsistent with the original defense. But the amendment here contemplated goes no farther than to state an additional fact unknown at the time of filing the original plea, and perfectly consistent with it.

In examining all the cases cited, I can find no one where leave to amend under circumstances analogous to these has been refused, where the amendment is necessary to place the grounds of defense fairly before the court.

The rule is stated in *Cooper's Pleading*, 336, that it is not usual to refuse leave to amend pleas, yet the defendant must be tied down to a very short time in which to amend; and this is fully sustained *by the case cited, 2 *Vesey*, 85, where 314 leave was given to plead *de novo*.

This practice is consistent with the practice in permitting amendments to sworn answers, and I can see no reason why the rule should not be admitted in amending pleas as well as sworn answers.

This is not a case where a party first obtains the opinion of the court, and then sets up an additional fact known to him at the time of pleading, or a defense inconsistent with the first plea.

It appears that this was unknown at the time of filing the plea, but has since been ascertained. I can see no danger in allowing an amendment in such a case when it seems absolutely necessary to place the defense fairly before the court.

On the contrary, it seems to me to be in entire harmony with the practice in analogous cases. If a plea may be amended upon the ground of a mistake or inadvertence, I do not see why it should not be for the purpose of stating a newly discovered fact necessary to the defense and consistent with the original plea.

Amendment allowed if made within ten days.

Attorney-General v. The Bank of Michigan.

Attorney-General v. The Bank of Michigan.

Corporations, jurisdiction over. The jurisdiction of this court over corporate bodies, for the purpose of restraining their operations, or of winding up their concerns, is based upon and controlled by the statutes of the State. It has no such jurisdiction at common law, or under its general equity powers, and it will not interfere except when the case is fairly brought within the scope and object of the statute conferring this special jurisdiction. (a.)

The provisions of the act of June 21, 1837, and the act of April 12, 1841, in regard to banks and incorporations commented upon and explained.

Statutes, construction of. Where one part of an act is equivocal, other portions of the act may be resorted to as a guide in construction. The occasion and the reason of the enactment, which is the same thing as the old law and the mischief; the letter of the act, whether words be used in their proper or in a technical sense; the context, the spirit of the act, whether statutes be in their nature remedial or penal, the subject matter and the provisions of the act, and the intent of the legislature in passing it, are to be considered; which intent is not to be collected from any particular expression, but from a general view of the whole of the act. (b.)

Forfeiture of corporate rights. If a corporation has forfeited its rights by misfeasance, or non-feasance, such forfeiture must be shown by the pleadings; it is not to be presumed; the legal presumption is otherwise.

The fact that a bank not protected by statute authorizing a suspension of specie payments, has stopped payment, is not of itself conclusive evidence of its inability to pay its debts, but is *prima facie* evidence of inability or insolvency. (c.)

Injunction against suspended bank. The rule adopted in this State has been not to grant an injunction in the first instance upon the allegation alone that a bank has stopped payment, but to grant a rule to show cause and require notice to be given to the defendants. If not explained or excused in cases where the banks are not protected from a forfeiture of their charters by reason of a failure, the court would be authorized to grant an injunction and appoint a receiver. But when banks are authorized to suspend specie payments, such refusal is not even *prima facie* evidence of insolvency.

The true construction of the sixth section of the suspension act of April 12, 1841, is that the statements should be made out and transmitted to the secretary of State on the days specified, or as soon thereafter as the same can be made out and stated.

(a.) See also Attorney-General v. Oakland County Bank, Wal. Ch., 90.

(b.) See Sibley v. Smith, 2 Mich., 486, which is to the same effect.

(c.) See Barnum v. Bank of Pontiac, *ante*, 116.

Attorney-General v. The Bank of Michigan.

Statutory condition, when to be performed. Where no time is prescribed in which an act is to be done, it must be done in a reasonable time. (d.)

Motion by complainant for a receiver, and on the part of the defendant for a modification of the injunction.

The bill states that December 19, 1817, the Bank of Michigan was incorporated, with capital of \$100,000; was organized and went into operation.

*That in accordance with the provisions in its charter, 316 the capital was afterwards augmented to the sum of \$500,000.

That February 25, 1831, the charter was continued for twenty-five years from and after the first Monday in June, 1839.

That ever since they commenced doing business, and down to the present time, they have had a banking house in Detroit, and have done an extensive banking business. That down to 1837, they were unembarrassed, and were able to meet and pay all their liabilities upon demand. But ever since that period, and down to the present time, they have labored under embarrassments, and have been unable during the greatest portion of the last mentioned period, and are now unable to meet and pay their liabilities; and that their officers have for some time past refused and still continue to refuse to pay the debts of the corporation; and that they have almost ceased the transaction of any business as a bank.

That the present liabilities of the bank are large; that its bills issued and in circulation amount to upwards of \$200,000; that it is indebted largely to depositors, and otherwise; all of which are payable on demand.

That the State of Michigan is a creditor as bill holder to over \$20,000. That June 11th, 1841, complainant demanded payment or security, which was refused by the president and cashier of the bank.

Complainant charges insolvency, and avers that the interests

(d.) See *Byram v. Gordon*, 11 Mich., 531, and *Stange v. Wilson*, 17 Mich., 342; where the same rule of computing time was applied under contracts.

Attorney-General v. The Bank of Michigan.

of the State require that it shall be enjoined, and a receiver appointed.

That in consequence of the refusal to redeem its bills, numerous suits have been commenced against it, and its cash funds are becoming diminished, and some creditors receive the full face of their debts, while others may ultimately receive but partial payment. That a due regard to the interest of the *creditors generally* requires an *injunction* to prevent the inequitable distribution of its cash means.

That in and by the act entitled "an act to provide for proceedings in chancery against corporations, etc.," approved June 21, 1837, the chancellor has power to restrain by injunction any bank from exercising any of its banking powers, and from receiving or paying out anything whenever the attorney-general upon

317 bill filed shall furnish *satisfactory proof that such bank *has become insolvent, or unable, or has refused, to pay its debts.*

And in and by the seventh section, the chancellor may compel such bank to discover any stock, property, moneys, things, choses in action or effects alleged to belong to it, or in any manner liable for the final payment of its debts, the transfer and disposition thereof, and all the circumstances of such transfer and disposition; and that every such officer, agent or stockholder may be compelled, at the discretion of the chancellor, to answer any bill filed to obtain such discovery.

The bill prays that defendants be required to answer all the allegations in the bill, and particularly that they answer and discover as particularly required in and by the seventh section as above quoted.

The bill prays the granting of writ of *injunction*, etc., restraining them from exercising any of their corporate rights, privileges or franchises, and from collecting or receiving any part of their debts due or to become due; and from paying out or in any way transferring any of the money, property or effects of the bank.

Also for the appointment of a *receiver* or *receivers*, in pursuance of the fifth section of the act last aforesaid, in order that the

assets of the bank may be applied in an equal and proportionate manner to the payment of its debts.

A temporary injunction was granted.

The answer admits the organization of the bank, the augmentation of stock, the extension of the charter; that it was unembarrassed up to 1837, that since that time it had been embarrassed and unable to meet and pay its liabilities, and has refused so to do. That the present liabilities of the bank are large, but insists that its liabilities are now less by \$1,200,000 than in 1837, and \$70,000 less than they were four months ago; and that for many years past their aggregate liabilities have not been so small as now.

Admits indebtedness to the State of Michigan to amount over \$20,000. And that the bank officers did refuse to pay the same as stated by complainant, and did decline to execute securities for the future payment of the same in specie; but that although they may have declared their inability to do so, as charged in the bill, it was not because the bank was not possessed of that, and a much larger amount in specie, but because they did not deem it their duty to pay *the State of Michigan in specie, when 318 they could not pay all bill holders in specie. But they aver that they did offer the attorney-general to turn out assets of the bank in payment; and that he might have selected from all the assets, amounting in all to nearly a million of dollars, and of a value very much more than sufficient to cover and pay all the debts of the bank.

Expressly denies insolvency, and avers that the contrary is the fact. That on 15th February last, upon the examination by committee of the legislature, the said committee and officers of the bank made a scrutinizing examination into the situation of the bank, and of all its assets; by which investigation it was ascertained as certainly as such a fact could be, that the assets were sufficient to pay off and discharge all its liabilities; and not only so, but also to leave a surplus, after being converted into cash funds, of more than \$400,000, to be divided among the stock-

Attorney-General v. The Bank of Michigan.

holders. That since said 15th February last, no material change has taken place in the condition or value of said assets, or to depreciate them, unless it be that the *two-thirds or appraisal law* passed last winter may operate injuriously. That some of their securities have been changed—some of the paper then held by the bank has been paid; but that no change has taken place so great as to render the insolvency of the bank a probable fact, although the stockholders may be affected. That the bank has in its vaults in specie funds about \$50,000.

Admits that numerous suits have been commenced and continue to be, to the injury of the bank, by accumulation of costs and expenses.

Answer avers that although now embarrassed, the bank is able and willing to pay and redeem all its bills by turning out its assets. That many of its creditors are desirous of being thus paid, and the interests of the public cannot be injured by it. That the bank has made great efforts to pay off their large liabilities which it had created in 1836-7; and has succeeded in liquidating almost entirely those which were the largest and most pressing, and is now comparatively free from the pressure of large debts.

States that the appointment of a receiver would be ruinous to the interests of the stockholders, and could not be beneficial to the public, *the State of Michigan, or the creditors of the bank. That a sudden and forced winding up of its affairs by a receiver would be productive of mischief and injury to the bank, stockholders and creditors.

Attorney-General, in person.

Insolvency is defined to be *inability or refusal to redeem*. Both are charged, and both admitted.

Suspension of payment is evidence of insolvency, which cannot be rebutted by the naked assertion of its *ultimate ability to pay*. Such assertion is nothing more than an expression of an opinion as to the future value of the assets.

Whether such opinion is well or ill founded depends upon the final result, and cannot be known until the usual process has been gone through of converting them into money.

The statements in the bill furnish evidence of insolvency.

The mortgage to the Dwights is evidence of insolvency.

If, then, there is good reason to believe the bank insolvent, *by whom shall its affairs be wound up?*

It is not proper to leave the bank in the hands of those officers under whose administration it has failed.

The appointment of receivers is necessary for this purpose.

The directors and officers of the bank are appointed by and represent the *stockholders*. Their sympathies and prejudices are with them, and are adverse to the bill holders.

The appointment of strangers will secure a fearless investigation of its affairs, which the public have a right to expect. It may become their duty to institute proceedings against the directors and officers.

The facts cannot be known until the receivers investigate.

In the language of Chancellor Walworth, "Those creditors who have been stripped of their property by the failure of the bank, have a right to claim from the court the appointment of receivers upon whose impartial investigations they can rely, and who could have no interests in opposition to theirs." (*1 Paige, 517; 3 Wend., 588.*)

Chancellor Walworth says: "If the interests of *stockholders* were first *consulted, it would be proper to give to 320 those indebted to the bank, and in poor circumstances, sufficient time to buy up the bills from *honest creditors* at a great discount, and thus restore the broken institution to a state of solvency. But in such case *the real creditors* would lose the greatest part of their debts, although the *stockholders* in the end might save something of the stock. It is therefore necessary and proper, in every case of this kind, *for the protection of the creditors*, who have the first claim to the property, *to turn its effects into cash with the least possible delay*, so that a distribution may be

Attorney-General v. The Bank of Michigan.

made *before their necessities or fears compel them to sacrifice their demands.*"

The bank now seeks to obtain *from the chancellor* what the legislature refused to grant them, to wit, immunity against its bill holders.

Joy and Porter, for defendants.

As to the jurisdiction of the court, it is limited by the statutes. *1 Edwards Rep.*, 87, and cases there cited, are conclusive.

The extent of the authority conferred is settled by this court in the case of *Barnum v. Bank of Pontiac*, *ante*, 116.

As to the proof of insolvency upon which charge alone the injunction rests, see *1 Paige*, 515; *3 Wend.*, 590; *1 Edwards*, 92; *2 Edwards*, 286.

A receiver, then, cannot be appointed. Will the court modify the injunction? It must *dissolve* it on motion, why not then modify? The answer is *ample and complete* as to the only charge upon which the bill rests; the whole *equity of the bill is denied*.

The only real question is whether the court will hear *this motion at this time*. We say it will, because the whole equity of the bill is denied, and exceptions can avail the complainant nothing if they are taken; they will only cause injury to the defendant without object. The rule relative to exceptions does not apply in such a case. (*4 Paige*, 111; *ante*, 162.)

Besides, the court reserved by its own order the power to modify at any time. (*Swanst.*, 228; *Merivale*, 29; *Eden*, 122.)

321 *As to the suspension law, the court must presume that the bank is under it, until the attorney-general shows that it is not.

So far as the Bank of Michigan is concerned, the terms of the law are express, and include the bank by name. The court will say and presume that the bank has accepted a law enacted for its benefit, unless the *contrary appear*. The answer was only to *the bill filed*. The bills neither of them charge that the bank has not accepted or availed itself of the suspension law, and it must of

course be taken to have done so unless the contrary be stated or in some way appear.

It does not fall upon us to show that we are under the protection of a law passed for our express benefit, unless the opposite party charges that we *are not under it*. *We are there until they show that we are not*.

A corporation will be presumed to have accepted of the terms of an act passed for its benefit, until the contrary appear. This is reason, and the principle has been repeatedly decided in the Supreme Court of the United States. Indeed this must be so, because otherwise the bank could not show the fact before July. The question of filing a statement does not come up because *it does not appear* to the court that it was not properly filed. And had any such charge been made, we should have shown that it was properly and duly filed under the law.

THE CHANCELLOR.—Before proceeding to the examination of the facts disclosed by the pleadings in this cause, it will be necessary to examine the statutory provisions which have a bearing upon the question presented. The jurisdiction of this court in this class of cases is based upon and controlled by the statutes. It has no such jurisdiction at common law. (*The Attorney-General v. The Utica Ins. Co.*, 2 Johns. Ch., 371; *Same v. Bank of Niagara, Hopk.*, 354; *Verplanck v. Mercantile Ins. Co.*, 1 Edw., 87.) In the last mentioned case the chancellor says: "After such repeated decisions expressly disclaiming all jurisdiction over corporate bodies for the purpose of restraining their operations, or of winding up their concerns under the general equity powers of the court, the complainants must not expect any interference, except it be under special authority of *existing 322 statutes, and when the case is fairly brought within their scope and object." The proceedings in this case are based upon the provisions of the act of June 21st, 1837. This imposes upon the court the duty of inquiring how far the powers and duties of this court are controlled by subsequent legislation. By the first section of the act of April 12th, 1841, it is enacted that every

Attorney-General v. The Bank of Michigan.

provision of law in force requiring or authorizing proceedings against the Bank of Michigan and the Farmers' and Mechanics' Bank of Michigan and their branches, with a view to forfeit their charters or wind up their concerns, or which requires them to suspend their operations and proceedings in consequence of a refusal to pay their notes or evidences of debt in specie, is hereby suspended. Section three requires the Bank of Michigan to lessen its liabilities at the rate of \$20,000 quarter-yearly. Section four prohibits any bank from dividing or paying to its stockholders or to any person for them any dividends, profit, or interest, until after it shall have resumed paying its debts and liabilities in specie, and shall have continued to do so in good faith for three months. Section five inhibits the banks and their officers from selling specie or bullion at a premium, and from purchasing its notes at a discount; and provides that "every violation of this section shall be a forfeiture of its charter." Section six is, "That every such bank or branch shall transmit a statement under oath of the president, cashier, and a majority of the directors, of its true condition, once in every three months, viz: On the first day of January, April, July and October, to the secretary of State, who shall cause the same to be published in the State paper; and the expense of such publication shall be paid by the banks respectively." Section seven is as follows: "It shall be the duty of the secretary of State, on the receipt of each quarterly statement provided for in the sixth section of this act, to transmit as soon as practicable, to the governor, lieutenant-governor, auditor-general and treasurer of this State, each a certified copy of such statement; and if on examination of the same, it shall appear to any one of said officers, including the secretary of State, that any bank availing itself of the provisions of this act is, or has been so

conducting its business, as in their opinion to endanger

323 the interests or security of the *public; or those holding its notes or other evidences of debt, or in any way improperly to abuse the privileges by this act granted; or if from any other cause any such officer shall have good reason to believe that

Attorney-General v. The Bank of Michigan.

any such bank has so improperly conducted, then it shall be the duty of such officer, with the advice and consent of one or more of his associates above named, forthwith to cause an examination to be made of the conduct and affairs of such bank; and in case it shall thereupon appear to the satisfaction of three or more of said officers, that such bank is, or has been conducting its business improperly as aforesaid, it is hereby made their duty forthwith to report such fact to the attorney-general, who is hereby required to proceed against such bank as directed in the tenth section of this act." Section eight provides that the Bank of Marshall, the Bank of Adrian, the Merchants' Bank of Jackson County, the Bank of Constantine, and the Erie and Kalamazoo Rail Road Bank, may avail themselves of the provisions of this act, by conforming to its requirements, upon obtaining the certificate of the auditor-general, State treasurer, and secretary of State, that their business has been honestly managed, and that they are in a sound condition. Section nine provides, that the auditor-general, State treasurer and secretary of State, before they proceed to examine such banks as may apply to them for that purpose, shall make oath before any person authorized to administer the same, that they will not grant a certificate to any bank unless they shall be perfectly satisfied that the resources of such bank are, and will be adequate to the *ultimate* payment of its circulation and all other liabilities permitted by this act. Section ten authorizes the attorney-general to proceed against any bank availing itself of the provisions of this act, and which shall directly or indirectly violate the same by injunction, *quo warranto* or otherwise, in the same manner as if this section (probably a misprint for act) had not passed. The act of April 12, 1841, in its material provisions is a literal copy from the suspension law of New York of May 16, 1837. The first section is identical except that the names of the Bank of Michigan and the Farmers' and Mechanics' Bank are introduced. Of the construction of the New York statute there is no doubt. In respect to a portion of the banks in that State, the law *requires that a bank which shall sus- 324

Attorney-General v. The Bank of Michigan.

pend specie payments shall, on pain of forfeiture of its charter, "wholly discontinue and close their banking operations." What was intended by the provision of the ninth section of the suspension law of New York, placing the banks under the supervision of the bank commissioners, and authorizing them to institute proceedings against any bank in dangerous or insolvent circumstances? It could not have intended an inability to pay their liabilities at the time, as the very object of the law was to relieve the banks from the penalties they incurred by reason of such inability. It must have contemplated *ultimate* insolvency. By our statute the officers who are constituted special commissioners for this purpose may, if they are satisfied any bank is so conducting its affairs as to endanger the security of the public or those holding its notes, institute an examination, and upon the concurrence of three of them proceedings may be instituted under the provisions of the act. There can be no doubt that the construction of the first section of the New York statute is, that every provision of law requiring or authorizing proceedings against banks with a view to forfeit their charters or wind up their concerns, and that every provision of law which requires them to suspend operations and proceedings in consequence of a refusal to pay their notes and evidences of debt in specie is suspended. I do not well see what other construction can be given to this section either in the New York act or our own. The words "or which" must refer to the *provisions* of law which were intended to be suspended. Where one part of the act is equivocal, other portions of the act may be resorted to as a guide. "The occasion and the reason of the enactment (which is the same thing with the old law and the mischief), the letter of the act (whether words be used in their proper or technical sense), the context, the spirit of the act (whether statutes be in their nature remedial or penal), the subject matter and the provisions of the act, have all to be considered. Again, the intent of the legislature is not to be collected from any particular expression, but from a general view of the *whole* of the act." (*Per Best, Ch. J., 3 Bing., 196; Dwarries*

on Statutes, 47, 48.) The ninth section of the law of New York places the suspended banks under the special supervision of the bank commissioners. The sixth section of our law requires the suspended banks *to transmit a statement of 325 their condition once in three months to the secretary of State. Section seven contemplates that the officers therein mentioned, and to whom a copy of each statement is to be transmitted, and each of them, shall exercise a supervision over those suspended banks, and if in the opinion of either of them, any bank is, or has been so conducting its business as to endanger the interests or security of the public or those holding its notes or other evidences of debt, any such officer, with the advice and consent of one or more of his associates, may institute an examination of its affairs. It has been shown that in the construction of statutes which may admit of doubt, we must resort to the object and intent of the legislature, the mischief to be obviated, and the remedy contemplated. It appears from the pleadings in this cause that the legislature had instituted a careful investigation of the affairs of this bank. The condition of its assets was not then materially variant from the present. Its liabilities have since that time been diminished some \$120,000, and it appears that for many years no part of its assets have been used otherwise than for the payment of its liabilities. The legislature must have been aware of the inability of the bank to pay off its liabilities immediately, though they seem to have entertained no doubt of its ultimate solvency. Can it by any possibility be inferred that the legislature contemplated or intended by this legislation that this bank should be wound up on the ground of insolvency under the state of facts here presented? The insolvency is again and again denied in every form by the president and directors, who must be deemed better able to form an opinion than strangers unacquainted with its concerns, and this, too, after a full, careful, and detailed investigation of all their assets and liabilities. Not only is insolvency denied, but it is alleged that there will remain a large surplus after the payment of all their debts and liabilities. Did the

Attorney-General v. The Bank of Michigan.

legislature intend to treat the several banks which should become subject to the suspension act unequally? This cannot be supposed. The ninth section provides, that the banks which are named in the eighth section shall satisfy the auditor-general, State treasurer and secretary of State, "that the resources of such bank as shall apply to them for that purpose, are, and will be adequate to the *ultimate* payment of its circulation and all other liabilities permitted by this act." This is in harmony

326 *with the supervision vested in those officers by the seventh section. Under that section, if they or any three of them should become satisfied that from the conduct of the bank or the condition of its affairs, legal proceedings were necessary to effect an equality of distribution or a proper application of its means, it would then be competent for them to direct proceedings to be instituted under the provisions of that act. For the purposes of this motion it should be remarked that this bank *must* be considered as under the provisions of the suspension act. It was placed expressly under it in terms, from and after the passage of the act. If it has forfeited its rights under it by misfeasance or non-feasance, such forfeiture must be shown. No allusion is made in the pleadings to any act of omission or commission by which such forfeiture has been incurred. It is not to be presumed. The legal presumption is otherwise. It has been held that grants beneficial to corporations may be presumed to have been accepted, and an express acceptance is not necessary. (*Charles River Bridge v. Warren Bridge*, 7 Pick., 344; *Dartmouth College v. Woodward*, 4 Wheat., 688; *U. S. Bank v. Dandridge*, 12 Wheat., 71.) But admitting that the operation of the first section of the suspension act should be limited to the failure to pay its notes or evidences of debt in specie, which from a careful examination I think it cannot, would the result be varied? The legislature could not have intended to apply one rule to the banks specially named in the first section of the act, and which were undoubtedly the principal objects intended to be benefited by it, and another to the other banks named in the act. We have seen

Attorney-General v. The Bank of Michigan.

that those banks were required only to satisfy the officers before named of their ability *ultimately* to pay their liabilities. We have seen this ability in the case under consideration asserted and reasserted in the broadest and most comprehensive form by those best acquainted with its condition. The answer, for the purpose of the present motion, must be taken as true. Under either construction of the act, then, the motion must be denied. Some misapprehension seems to have been entertained upon the effect of the refusal of any bank not protected by statute to pay its debts or liabilities in specie. The rule adopted here is the same as in New York. In the case of the *Attorney-General v. The Bank of Columbia*, 1 *Paige*, 511, the chancellor says, that the fact that the bank has stopped *payment is not of itself conclusive 327 evidence of its inability to pay its debts, but is *prima facie* evidence of inability or insolvency. In the case of *Stuart v. Mechanics' Bank*, 19 *Johns.*, 497, it is said "a bank may be quite solvent notwithstanding it fails to redeem its bills. This we know to have happened in several instances where the ability and solvency of the banks have been afterwards fully established." The rule adopted here has been not to grant an injunction in the first instance upon this allegation alone, but to grant a rule to show cause and require notice to be given to the defendants. If not explained or excused in cases where the banks are not protected from a forfeiture of their charters by reason of a failure to pay specie, the court would be authorized to grant an injunction and appoint a receiver. But where banks are authorized to suspend specie payments, it is not *prima facie* evidence of insolvency. It may be proper to say that the result to which I feel myself compelled, by the provisions of law bearing upon this case, to arrive, in my opinion will be better for the interest of the billholders and creditors of the bank than would be the usually disastrous measure of appointing receivers. It must be apparent that in the present condition of the country such a measure must result in great losses, and that heavy expenses must be incurred, and if by such means the resources of the bank should be found

Attorney-General v. The Bank of Michigan.

insufficient to pay its liabilities, the loss must fall upon its creditors. The entire resources of the bank have been thus far applied to the payment and security of its debts, and the officers of the bank in their answers state their intention to continue so to do. The aggregate amount of the indebtedness of the directors is small. No part of the resources of the bank has been diverted to pay dividends, and I can perceive nothing in the case as presented before me to lead to the belief that the affairs of this institution have not been honestly and in good faith administered. But these remarks, which would apply properly in a case for the exercise of discretion in the appointment of a receiver, are perhaps unnecessary in the present case, as from the view I have taken of the law bearing upon it, and from which I cannot escape, there is no room for the exercise of this discretion in the case. The law being positive, the rights of the defendants are fixed, and the duty imposed upon the court imperative. A question

328 has been incidentally *raised as to the construction of section six of the suspension act, but as it is not necessary to the decision of the case, I have had some doubt as to the propriety or necessity of expressing an opinion upon it. The facts do not appear as to when this bank filed its statement of the condition of its affairs. The question is, are the banks compelled to transmit a statement of their condition on the first days of January, April, July and October, or are they to transmit a statement of the condition *they were in on those days* as soon as the same can *thereafter* be made out and stated? It would of course be impossible to ascertain their condition on a particular day and make and transmit a statement on the *same* day. If the statement is to be *transmitted* on those days, it *must* be of their condition on some *previous* day, and each bank must be left to select its own day. This would certainly open the door for transfers from one to the other, and might lead to inconveniences which the legislature intended to guard against by requiring a simultaneous statement of the condition of all the banks on the same day. Some of the banks contemplated by the terms of the act are situate some one hun-

Attorney-General v. The Bank of Michigan.

dred and fifty miles distant from the office of the secretary of State. Are those banks required to file on that day a statement of their condition, or on some indefinite previous day of their own selection, or must they "transmit" by mailing their statement on that day, or was it the intention of the legislature that they should transmit a statement of their condition on the particular days indicated by the act? The statute requires that the statement of the condition of the banks shall be made under oath of the president, cashier, and a majority of the directors. Should this be impossible, from the absence or sickness of the president or cashier, or a portion of the directors, must the statement be actually transmitted on this particular day under pain of a forfeiture? The language and object of the act, the security intended to be afforded to the public, the inconvenience, if not impossibility of otherwise conforming to its terms, all concur in leading to the construction that the statements shall show the condition of all the banks under the suspension law at one and the same period of time; and that their statements shall be filed as soon as they can properly be prepared and examined by the different officers required to make oath to the truth of the statements of their condition *on those days. Where no 329 time is prescribed in which an act is to be done, it must be done in a reasonable time, and this must be determined by the tribunal before which the question may be made. (9 Pick., 404; Coke Litt., 208.) But if the construction should be otherwise, I do not perceive how a failure to conform to this section on the particular days mentioned can be held *ipso facto* to work a forfeiture. The rights and immunities conferred upon this bank by the first section of the suspension act are positive and unconditional. The fifth section provides, that a failure to conform to the provisions of *that section* shall work a forfeiture. The sixth section is directory, and imposes no penalty or forfeiture. The consequence of a failure to conform to the requirements contained in that section, therefore, would subject the delinquent bank to be proceeded against under the provisions of the tenth section of the

Graves v. Niles.

Calvin Graves and others v. Johnson Niles and others.

Supplemental bill, what may embrace. If material facts have occurred subsequent to the commencement of the suit the court will give the complainant leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original by way of amendment; and this is especially proper where the matter which occurred prior is necessary to the proper elucidation of that which occurred subsequent to the filing of the original bill.

Supplemental answer, leave to file when allowed. An application to file a supplemental or amended answer is seldom granted, and never without the utmost caution, and when a just and necessary case is clearly made out, and it is then generally confined to a clear case of mistake, as to matter of fact, and as to that only; and the court is still more cautious in granting such an application after a considerable lapse of time from the filing of the bill or original answer in the case.

Where a motion was made to file a supplemental or amended answer in which it was proposed to take entirely new ground, and change entirely the character of the defense, and this not upon the ground of any actual mistake in a matter of fact, or upon any discovery of new facts, but upon the ground that the defendant did not mean to be understood to state as he had stated in his answer, the court denied the motion.

But where there was doubt in regard to the proper application of certain moneys admitted to have been received by the defendant, and the answer was obscure, and there was a possibility that great injustice might be done to the defendant, the court granted an order with reluctance, permitting a separate supplemental answer to be filed, as to this particular, and explaining this ambiguity.

Where a defendant had leave to file a supplemental answer to explain certain ambiguities in his original answer, and he incorporated other matters of defense in his supplemental answer, on motion of the complainant the supplemental answer was ordered to be taken off the files.

This was a demurrer to a supplemental bill filed by leave of the court. The case is stated in the opinion.

A. D. Fraser, in support of the demurrer.

1. That the bill is exceptionable on the ground that the complainants have incorporated in it as well matter which occurred previous to the filing of the original bill, and which might be

introduced by amendment, as things which occurred subsequent to the filing of the original bill, and which should come in by way of supplement. (1 *Paige*, 200; 3 *Ib.*, 294; 4 *Ib.*, 127; *Mitford's Pl.*, 165; 17 *Vesey*, 143.)

2. That the new matters introduced are not material and necessary to the complainants in the prosecution of this cause. (17 *Vesey*, 143; 1 *Smith's Pr.*, 204.)

D. Goodwin, contra.

The demurrer in this case should be overruled as frivolous :

*1. Leave was granted to file this identical bill. Such 333 is the order, and it cannot be otherwise construed. The whole proceedings were one act, to wit, the leave, the filing and the granting the injunction. And if there were ambiguity, the court knew the facts, and would so construe it; and would do so even if there were a clerical mistake in the entry.

2. In the supplemental bill, which contains new matters, after the filing the original bill, other facts previously existing may be introduced in connection with the new matter. Such is the general practice. No case has been or can be shown to the contrary. The case cited of *Stafford v. Howlett*, 1 *Paige*, 200, is with us. The chancellor says: "If it appears upon the face of the supplemental bill that *the whole* of the matters charged therein arose previous to the commencement of the suit, and that the situation of the cause is such that they may be introduced into the original bill by amendment, the defendants may demur."

Two things must concur to sustain the demurrer. 1st. *The whole* of the matters stated must have existed prior to the commencement of the suit. And 2d. The situation of the cause must be such that they may be inserted in the original bill by amendment. (*Lewellen v. Mackworth*, 2 *Atkyns*, 40; *Baldwin v. Mackown*, 3 *Atkyns*, 817; 2 *Mad.*, 510; *Cooper's Pl.*, 75.)

3. The matters alleged to have previously existed are merely introductory to and explanatory of the new facts, and necessary

Graves v. Niles.

to their understanding, and the repetition for that purpose of facts stated in the answer.

THE CHANCELLOR.—The principal ground relied on in support of this demurrer is, that the complainants have interposed in the supplemental bill, matters which occurred prior to the filing of the original bill. The supplemental bill in this case was filed by leave of the court.

The matters which are stated in the supplemental bill, and which occurred prior to the filing of the original bill, are 334 to some extent *connected with those matters stated as having occurred subsequent to the filing of the bill and necessary to their proper explanation. If material facts have occurred subsequent to the commencement of the suit, the court will give the complainants leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original, by way of amendment. (*Stafford et al. v. Howlett & West, 1 Paige, 200.*) This is certainly proper, where the matter which occurred prior is necessary to the proper elucidation of that which occurred subsequent to the original bill.

This bill was filed in pursuance of leave granted, and under this leave it was competent to insert the allegations contained in it. The bill in other respects contains sufficient to sustain it upon general demurrer.

Demurrer overruled, with leave to answer on the usual terms.

After the answer had been filed a motion was made on the part of the defendant for leave to file a supplemental or amended answer.

A. D. Fraser, in support of the motion.

“Where there is a clear mistake in an answer, and proper to be corrected, the practice is to permit the defendants to file an additional or supplemental answer.” (4 *Johns. Ch.*, 375; 8 *Vesey*,

Graves v. Niles.

79; 10 *Ib.*, 284, 401; 1 *Dick.*, 33, 35, 285; 2 *Dick.*, 485; 2 *Att.*, 294; 1 *Brown C. C.*, 418.)

"Where a party has omitted to lay before the court as he ought, a case, admitting a mistake and desiring leave to rectify it, the proper course is to put in an explanatory answer upon which the court will judge." (19 *Vesey*, 584.)

Where a party is negligently or fraudulently led into a mistake the court will permit him to file a supplementary or additional answer. (19 *Vesey*, 628; 10 *Vesey*, 401.)

R. Manning, of counsel, argued this motion on the part of the complainants.

The defendant's motion should be denied.

1. The principal facts on which the defendant bases his application are denied by the affidavit of Mr. Porter.

2. Two years have elapsed since the defendant filed his answer, and he shows no good reason why he has not applied to the court before *for what he now asks. In *Curling v. 335 Marquis Townshend*, 19 *Ves.*, 628, the lord chancellor says: "I dare not in such a case, let it be in fact what it may, lay down a principle that could form a precedent for permitting an answer, after the lapse of two years, to be altered in effect from one end to the other."

3. The defendant does not specifically state in his affidavit the whole of the matter he wishes to place upon the record by his additional or supplemental answer, as he should have done, to enable the court to judge of the reasonableness of his application. (19 *Vesey*, 631.)

4. The answer of the defendant is clear and consistent with itself, and not contradictory in any of its material parts. But, in connection with the explanatory matter set forth in the defendant's affidavit, it would be vague, uncertain and indefinite.

5. The answer and explanatory matter, taken together, show the defendant to be guilty of a conspiracy, with Turner & Collins, to defraud Hatch, Scrantom & Kimball.

Graves v. Niles.

6. In cases of this description, when the granting of the motion will operate to the prejudice of the complainant, the court will deny the application, unless under very peculiar circumstances, and where the defendant makes out a strong case. (*Wells v. Wood*, 10 Ves., 401; *Bowen v. Cross*, 4 Johns. Ch., 375; *Greenwood v. Atkinson*, 4 Simons, 54; *Curling v. Marquis Townshend*, 19 Ves., 628.)

THE CHANCELLOR.—This is an application seldom granted, and never without the utmost caution, and when a just and necessary case is clearly made out.

In the case of *Bowen v. Cross*, 4 Johns. Ch., 375, an amended answer as to a clear case of mistake as to matter of fact, and as to that only, was permitted.

Lord Eldon, in the case of *Curling v. the Marquis of Townshend*, says: "It would be very difficult, even upon negligence, unless the party was led into it, to have the records of the court altered, and I dare not in such a case, let it be in fact what it may, lay down a principle that would be a precedent for permitting an answer after a lapse of two years, to be altered in effect, from one end to the other." And he further says, although he

336 has been said to have * been too liable to hesitation and doubt in his decisions: "I should be sorry to be thought to have much doubt upon a point of so much importance."

What is the case here? In the fifth folio of his answer the defendant says that in July, 1836, he, together with Turner and Collins, the two partners in these transactions, met together in Detroit, and that the said Collins then and there sold his interest in all the said parcels of land above described, and in the joint funds in the hands of this defendant, as he then informed this defendant, to one A. W. Hatch, either for the benefit of said Hatch or for and on account of Henry Scrantom, and D. F. Kimball, of Buffalo, for whom said Hatch was agent, and goes on to state the mode of payment.

Again, in the tenth folio, he states that having been informed

Graves v. Niles.

and believing that said Collins had sold all his interest in said property and investment to said Hatch or Scrantom & Kimball, etc. He also denies all further interest of said Collins or his assignees in the investment thereafter mentioned.

It is now sought by the proposed amendment, or supplemental answer, to take entirely new ground, and change entirely the character of the defense, and this not upon the ground of any actual mistake in a matter of fact, or upon any discovery of new facts, but upon the ground that he did not mean to be so understood, and "he intended merely to state that said Collins had no avowed interest in said investment and purchases, as it was understood between said Turner and Collins that said Turner should take the interest of said Collins, but upon what secret trust or qualification in favor of said Collins this defendant is unable to set forth."

This is not very distinctly stated, and perhaps, as to this part of the amendment sought to be made, this would be a sufficient answer.

But I am disposed to place it upon other grounds. It is entirely inconsistent with the version given in the original answer. There is no mistake of any facts shown, nor any new discovery suggested.

From the affidavit of Mr. Porter the answer seems to have been examined by this defendant, before it was engrossed as well as afterwards, at least with usual care and attention; and, although this defendant may possibly have been so unfortunate as to have entirely misapprehended the purport of the answer in this respect, yet, regarding *the general inter- 337
ests and rights of suitors, and the proper administration of justice, it would be establishing a precedent of the most dangerous tendency, after the lapse of two years, and after the circumstances and the property may have changed, to permit such a change of the record when it may so materially affect the rights of the complainants.

The new aspect sought to be given to the defense strikes me as

Graves v. Niles.

somewhat unfair toward the vendees of Collins, on the part both of Niles and Turner, and the application may not, on that account, acquire any additional claim to a favorable consideration.

There is one portion of the amendment sought to be made which, however, has pressed more strongly upon me. The defendant admits the receipt of \$4,995, on account of, and in full for the proceeds of Hatch's note, indorsed by Scrantom and Kimball, and confesses himself liable and ready to account to any person or persons entitled thereto, under the decree of this court. It is very possible that it may turn out that the defendant was entitled to apply this money to the purposes for which this association was formed, either in liquidating liabilities already incurred, or in improving the property according to the original agreement; and, if it has been so applied, if the vendees of Collins should be entitled to his proportion of this investment, it would be unjust to hold him also to account for the money, under this equivocal expression in the answer.

But, if it has been properly and lawfully expended upon the property, to a portion of which these vendees may be entitled, it does not strike me that this defendant would be estopped by expressing his readiness to account for it to any persons *entitled* thereto under the decree of this court.

But as it is possible that great injustice may be done to this defendant in this respect, and as he now swears that he meant no more by this expression than to express his readiness to account for the manner of his expenditure upon the joint property under the agreement; and, as there is a supplemental bill to be answered, so that the complainants will not be delayed thereby, I am disposed, but with some reluctance, to permit a supplemental answer to be filed, as to this particular, and explain-

338 ing this ambiguity, but limiting it to this only; *and to this extent we are perhaps sustained by the case of *Livesey v. Willson*, 1 *Vesey & Beames*, 149.

The original answer will remain on file unchanged, and the

Graves v. Niles.

effect, to be given to either the one or the other, must be reserved until the explanation is before the court.

Whereupon the following order was entered :

"Ordered, that leave be granted to said Niles to file a supplemental answer in explanation of that part of his answer, now on file, which confesses and acknowledges his liability and readiness to account for the sum of \$4,995 to any person or persons entitled thereto under the decree of this court, but that, in accounting for the whole or any part of said money by said supplemental answer, he be restricted to showing an application of the money to the purposes for which the association between himself, Collins and Turner, was formed, either in liquidating liabilities already incurred at the time he alleges Collins sold out his interest to Hatch, or in improving the property according to the original agreement that had at that time been purchased for the association, and the effect, to be given to either the original or supplemental answer, is reserved until such supplemental answer is before the court."

A supplemental answer having been filed under this order, explaining the ambiguities contained in the original answer, and incorporating other matters of defense, the complainants moved to take the supplemental answer off the files, and upon this motion the following opinion was delivered.

THE CHANCELLOR.—The grounds of the order permitting this supplemental answer to be filed seem to me to have been distinctly stated.

The propriety of that order is not now under discussion, but, from further reflection, and without reference to this particular case, I am satisfied that a departure from the rule there established would open a wide door for fraud, and afford strong temptations to perjury ; its inconveniences and dangers are obvious.

But the question now presented is, does the answer go beyond the order? It manifestly does so. The order was limited to

339 the explanation *of the manner of the expenditure of \$4,995. This answer attempts to do inferentially, if not directly, what is expressly said it is incompetent to do—to change entirely the attitude assumed in the former answer. It purports not only to show the expenditure of upwards of \$10,000, but to show that this was done on account of, and with the concurrence of those-whose interest is denied in the first answer.

I am unwilling to deprive the defendant of the benefit of the first order. It is impossible, by expunging a portion of this, to leave the answer intelligible, and I see no other mode of correcting the error but to grant the motion to take the answer from the files, with leave to file a supplemental answer in twenty days, in conformity with the directions given in the former order.

Topliff v. Vail.

Silas Topliff v. Albert L. Vail and others.

Partnership: Equities of individual and partnership creditors. As between bona fide creditors of a previous firm and the separate creditors of a partner who continued the business and was the sole visible owner of the property employed in trade, and where the separate creditors had given credit, relying on the property employed in trade for payment, such creditors should be preferred to the creditors of the previous firm.

The creditors of a partnership have a right to payment out of the partnership effects in preference to the creditors of an individual partner.

In the absence of any agreement to the contrary, it is fair to presume that a retiring partner does not intend that the partnership property shall be used for the individual benefit of a partner who continues the business, leaving the debts of the firm unpaid; and this was held to be the presumption where the retiring partner transferred the partnership effects to a partner continuing the business, who agreed to pay the partnership debts and gave bond to that effect.

The bill in this case states that the complainant and defendant Albert L. Vail, being copartners, on June 25, 1840, dissolved. That the complainant sold out his interest in the copartnership property to said Vail, and received from Vail his pay therefor, and that Vail, at the same time, executed to the complainant a bond in the penal sum of \$5,000, conditioned that said Vail should pay all the partnership debts. Alleges that Vail has since fraudulently transferred the partnership effects to the other defendants for the purpose of preventing their application to the payment of the partnership debts; that Vail had absconded, etc. Prays that the partnership property be applied to the payment of the partnership debts for which the complainant is liable, and for an injunction to restrain misapplication.

Upon this showing an injunction was granted, and the defendants moved to dissolve the injunction for want of equity in the bill.

R. Manning, in support of the motion.

Topliff v. Vail.

The sale changed the copartnership property into the individual property of Vail. It was no longer the property of the copartnership, but the property of Vail, who had purchased out the interest of his copartner. (*Ex parte Ruffin*, 6 Ves., 119; *Ex parte Fell*, 10 Ves., 347; *Ex parte Williams*, 11 Ves., 3.)

This is the case of one copartner selling his interest in the firm to another who is to continue the business on his own account. It is not a dissolution of the copartnership and a placing of its effects in the hands of one of the copartners
841 to pay the debts and wind up the *business; when that is the case, the ownership of the property is not changed, but what was copartnership property at the dissolution continues to be such until it is used to pay the debts, or a division of it is made. The individual left in possession of it holds it in trust for that purpose. The case of *Deveau v. Fowler*, 2 Paige, 400, is a case of this description. On no other principle can it be reconciled with the cases in Vesey. The cases we have cited were not decided by Lord Eldon on any principle of law peculiar to the bankrupt law of England.

The facts in the case of *Deveau v. Fowler* are not fully stated by the reporter. It appears from the case that "on dissolution of the copartnership it was agreed that the defendant should take all the stock and effects, and pay off all the debts due by the firm, and indemnify the complainant against the same." It does not appear in that case, as in this, that the complainant received anything for his interest in the copartnership effects, or that he took a bond from the defendant for the payment of the copartnership debts, or that the copartnership property was left with the defendant with a view to his continuance of the business. The only inference to be drawn from the case is, it would seem, that the defendant was to pay the debts with the *copartnership effects*, which were to be used for that purpose and no other. This appears to have been the light in which Chancellor Walworth viewed the facts in that case, for he says: "The fair presumption in the absence of any express agreement to the contrary, there-

Topliff v. Vail.

fore, is, that it was not the intention of the complainant that the effects assigned to the defendant should be appropriated to the private use of the latter, leaving the debts of the firm unpaid." (See also *Collyer on Partnership*, 91; *Ib.*, 504 to 508.)

Baker & Millerd, contra.

It is alleged as the ground of this motion, that the sale by Topliff to Vail converted the partnership property into individual property, and that thereafter the complainant had no lien or equity to demand that the property should be appropriated to the payment of partnership debts.

We think it clear that such was not the effect of the transaction.

*The bill states he sold and assigned the partnership 342 effects. But this was upon the agreement of Vail to pay the debts of the partnership. This was an entire transaction.

Vail was to take the property and pay the debts, and any surplus that might remain was to belong to him.

Topliff received no security for the payment of the debts, and no indemnity against them, except the agreement and individual responsibility of Vail, which agreement was a *condition of the sale*. All that Vail would be entitled to under this arrangement would be the surplus after paying the debts of the firm.

The cases cited in support of the motion, *ex parte Ruffin*, *ex parte Fell*, *ex parte Williams*, etc., are none of them like this. They are all *bankruptcy cases*, where the question arose not between the partners, but between the joint creditors of the partners, and the separate creditors of the bankrupt partner. In Ruffin's case (and all the others are similar) one of the partners sold out to the other and retired from the business—the latter agreeing to pay the debts, etc. The purchasing partner continued the trade for a year and a half, and then became bankrupt. The joint creditors presented a petition praying that the partnership effects remaining in specie might be appropriated to the payment of the partnership debts in preference to the

Topliff v. Vall.

separate creditors of the bankrupt. As between them the question was materially different from the question between the parties to this suit.

In the first place there was no pretence of *fraud* or bad faith in that case, in any quarter; whereas fraud and bad faith on the part of the defendants form the very foundation of this suit.

It is admitted by counsel against the petition in Ruffin's case, that fraud would vitiate all transactions of this kind; but his claim was placed on the ground that there was no fraud in the case. And also on the ground that to admit the claim of the petitioners, and to give the joint creditors a lien on the property after a sale, and after the trade had been continued *for years* by the purchasing partner (and in that case it had been with the knowledge of the joint creditors), would operate unjustly and as a fraud upon the separate creditors of that partner, who

843 were presumed to have given credit to him upon **the faith of what they saw as separate property*, the purchasing partner being the *visible owner*. In this case there are no separate creditors, and therefore no such equities exist.

The decisions in the cases cited all evidently turn upon the construction given to a certain provision in the bankrupt act, 21 James I, ch. 10, secs. 10, 11, by which all the property which remains in the possession, order and disposition of the bankrupt at the time of the bankruptcy, is made to pass by the assignment to the assignee. (See *Jones v. Gibbons*, 9 Vesey, 407.) See also the case of *Shakeshaft et al.*, cited by Mr. Mansfield in Ruffin's case, in which Lord Thurlow said that he could not take accounts between the respective partners, but finding the effects *in the hands* of one, *whatever might be the demands of the others*, or the consequence to the joint creditors, the goods were the separate property of that one, and must be applied to his separate debts. In that case the bankrupt partner happened *by accident* to have the property in his hands—there had been no purchase or payment by him. So far was the provision in the bankrupt act referred to held to extend.

Topliff v. Vall

But even in the case of Ruffin, notwithstanding it was a bankruptcy case, and notwithstanding this statute, the lord chancellor does not express a decided opinion. He denies the relief sought on the petition, *because it was a matter of doubt* whether they were entitled to it, and therefore that it would be better to leave the parties to *file a bill*.

Ex parte Fell, 10 Vesey, 347, differs but little from Ruffin's case, except that the retiring partner received *security* for his indemnity, and for the payment of the debt, besides the agreement and individual responsibility of the remaining partner. His equities upon the property would therefore be less strong than in Ruffin's case.

But another thing that renders those cases unlike the present is that the petitioners were the *creditors* of the partnership, and they had *another remedy*, for the selling partners were solvent, and they could collect their debts of them.

We rely on the case of *Deveau v. Fowler*, 2 Paige, 400, and on the case of *Smith v. Haviland & Field* there cited. These cases are precisely in point, and the former is *identical* with this in almost all its circumstances, so far as this branch of the case is concerned. *The great difference between this 344 case and also the one in Paige and the cases in Vesey, etc., is that in the latter the question was between *bona fide* creditors, and the rights of *bona fide* holders of property were to be affected; whereas in these no such rights are to be affected so far as appears upon the bill, and the suit is against a partner fraudulently seeking to smuggle the property and to appropriate it, not to pay his *separate creditors* but to *his own use*, and against others fraudulently conniving with and aiding him in this object. The equities, therefore, in the two classes of cases, without reference to the provisions of the bankrupt act, are widely different.

But there is another branch of this case left out of view by the counsel for the motion. The equity of the bill does not rest alone in the equitable lien of the complainant as a *partner* on the *partnership property*. It rests also upon the liability of the complain-

Toplis v. Vail.

ant to pay the debts, upon the fact that the defendant, Albert L. Vail, is legally and equitably bound to the complainant to pay them and save him harmless, upon the *fraud* of Vail in assigning and disposing of his property and himself absconding, so as to *deprive the complainant of all remedy at law*.

Certainly these peculiar circumstances would give a court of equity jurisdiction of the case, and would entitle the complainant to come into court and obtain a discovery and relief, even

345 though there were *none of the partnership property left, or though there had been no partnership. He would be entitled to come in and file his bill for the purpose of setting aside this fraudulent conveyance, and obtain an injunction against removing or disposing of the property—particularly as both the assignor and assignee are out of the jurisdiction of any court of law of this State.

THE CHANCELLOR.—I can see no well founded distinction between this case and the case of *Deveau v. Fowler, 2 Paige, 400*.

The cases cited from Vesey, I am inclined to think, stand on a different ground.

As a question between *bona fide* creditors of a previous firm and the separate creditors of a partner who continued the business, and was the sole visible owner of the property employed in the trade, I should concur in the view that where the separate creditors had given credit relying upon the property employed in the trade for payment, they should be preferred to the creditors of the previous firm. But no such question arises here as the case now stands. The whole transaction is alleged to be fraudulent, that the remaining property of this firm has been fraudulently transferred, and without consideration, to prevent its application to the payment of the partnership debts; and this for the purpose of this motion must be considered as admitted.

The creditors of a partnership have a right to payment out of the partnership effects, in preference to the creditors of an individual partner.

Topliff v. Vail.

In *Deveau v. Fowler*, the partnership effects were transferred to the partner continuing the trade, and he agreed to pay the partnership debts; and that is this case. The circumstance of taking the individual bond or guarantee of this partner does not vary the case.

I think the chancellor was right in the last mentioned case, in saying that in the absence of any agreement to the contrary, it is the fair presumption that the retiring partner did not intend that this property should be used for his individual purpose, leaving the debts of the firm unpaid. This case as it now stands is stronger than the case of *Deveau v. Fowler*.

Here it is alleged that Vail has fraudulently transferred the assigned *effects for the purpose of preventing 346 their application to the payment of the partnership debts, and that he has absconded.

The complainant does not ask that the partnership property shall be reconveyed to him, but applied to the payment of the partnership debts, for which he is liable. If the goods were in the hands of a *bona fide* purchaser, it would present a very different case.

Motion denied.

Suydam v. Dequindre.

Richard Suydam and others v. Antoine Dequindre and others.

Bill to enforce a trust: Parties. To a bill to enforce a trust, it is not necessary to join as defendants parties having a prior interest subject to which the assignment was made. (a.)

The trust being under a general assignment for the benefit of creditors, some of the creditors filed a bill to have the assignment set aside as fraudulent, or, in case it was sustained, then to have the trust enforced. The bill averred that certain other creditors had been paid their demands in full. *Held*, not necessary to make such persons parties to the bill.

One of the creditors who had not been paid was made a defendant instead of complainant. *Held*, that as complete justice could be done between the parties on this bill, the fact of his not being made complainant was not good cause of demurrer.

The fact that a time is limited in the assignment for the closing of the trust, will not preclude the filing of the bill before that time has expired, where the bill alleges that the assignee has done nothing in the execution of the trust.

Assignment: Acceptance. An assignment for the benefit of creditors absolute in its terms, and which is accepted by the assignee, dedicates the property absolutely to the purposes of the trust, notwithstanding it is made without the knowledge or concurrence of the creditors.

By the execution and delivery of the assignment the relation of trustee and *cestui que trust* is constituted at once, without any express assent of the creditors; and it cannot afterwards be revoked except upon the dissent of creditors.

Assignment for the benefit of creditors: Receiver. The court in decreeing the execution of the trust under an assignment, under the special circumstances of the case, appointed a receiver for the purpose.

The complainants in this case file their bill as creditors of Antoine Dequindre, seeking to have an assignment made by him to Peter J. Desnoyers (who is made defendant), and which purports to be for the benefit of his creditors generally, set aside as fraudulent, or, in case it is sustained, then to have the execution of the trust thereunder compelled, and for the appointment of a receiver for the purpose. James Boyd, jr., one of the creditors,

(a.) Only those whose interests would be affected by the decree need be made parties. *Norris v. Hurd*, Wal. Ch., 102.

Suydam v. Dequindre.

was made a defendant; others were not made parties at all, the bill averring that their demands had been paid in full. The assignment was set out in full; it bore date October 24, 1836, and the trustee was directed to proceed to sell the assigned property at private sale, and that such of it as should not be thus disposed of within eighteen months should be sold at public auction within two years thereafter. The bill was filed before this two years had expired. The Detroit and Pontiac Railroad Company, which appeared by the recitals in the assignment to have rights in some of the assigned property, was not made a party. The bill averred that the assignee had taken no steps in execution of the trust.

The defendants demurred to the bill.

A. D. Fraser, for defendants.

E. C. Seaman, for complainants.

THE CHANCELLOR.—The first point made in support of the demurrer *is that the time limited in the deed of 348 assignment for closing the trust had not expired at the time of filing the bill in this cause. The deed of assignment was made on the twenty-fourth day of October, 1836; the time limited for closing the trust expired on the twenty-fourth day of April, 1840, and the bill was filed on the ninth of March, 1840.

The bill alleges that the assignment was fraudulent, and it is further alleged that the trustee, up to the time of filing the bill, had neglected to take possession of the property, or to take any steps towards executing the trust, and had declared his intention not to execute it. The demurrer cannot be sustained on this ground. The complainants who are judgment creditors were authorized under these circumstances, and before the time had expired for closing the trust, to resort to this court either for the purpose of setting aside the assignment or to procure the aid of this court to compel an execution of the trust. Other causes of demurrer were suggested *ore tenus*: *First*, that the Detroit

Suydam v. Dequindre.

and Pontiac Railroad Company should have been made parties. I think this was unnecessary. Their rights accrued prior to the execution of the deed of assignment, and are set forth in that instrument, which is recited in the bill, and if a sale of the premises shall become necessary, they must be sold subject to the rights of the company. (*Eagle Fire Company v. Lent et al.*, 6 Paige, 635.) It is also urged that several persons who were named as creditors in the assignment are not made parties to the bill; as to all those persons it is alleged in the bill that the debts due to them have been paid and extinguished. This is sufficient upon demurrer. If the allegations in the bill in this respect prove true, it was not necessary to make them parties. The other objection is that James Boyd, jr., should have been made a complainant instead of a defendant. It would seem to me to have been preferable if the bill had been so framed, but he has been made a party, and the court will be able to settle and adjudicate on his rights in the case, under the present bill. It is merely a technical objection, and not sufficient to sustain the general demurrer.

Demurrer overruled and leave to answer.

349 *The defendant Dequindre put in an answer denying all fraud, and claiming the right to revoke the deed of assignment on the ground that the creditors were not parties or privies to the deed, and never claimed any benefit under it until about the time of filing the bill in this case.

After the filing of this answer, the complainants' solicitor moved for the appointment of a receiver.

E. C. Seaman, in support of the motion.

1. The deed from Dequindre to Desnoyers created a trust, which Desnoyers accepted by executing the deed and putting the same on record. (See *Jeremy Eq.*, 138.)

2. Desnoyers, having accepted the trust, was bound to execute it faithfully, and a court of equity has power to enforce its execution in behalf of the *cestui que trust* (2 *Story Eq.*, 303, 304; *Jeremy Eq.*, 20; *Sands v. Codwise*, 4 *Johns.*, 536); and if the trustee dies

Suydam v. Dequindre.

or is incompetent or refuses to act, or if there has been an omission to appoint one, the court will appoint. (*Jeremy Eq.*, 20, 163.)

In this case Desnoyers utterly refused to act as trustee before the bill was filed, and the time within which he was authorized to sell expired in April, 1840, and he is now a naked trustee holding the legal title without the power to sell.

3. As Desnoyers has refused to act, and his power to act has expired, a receiver should be appointed to collect the rents and profits for the benefit of the creditors, as well as to take charge of the property.

In all cases where there is danger of trust property being squandered, a court of equity will appoint a receiver. (*Story Eq.*, secs. 827-829, 836; *Jeremy Eq.*, 174, 248; 2 *Madd. Ch.*, 189; 12 *Vesey*, 4; *Hart v. Crane*, 7 *Paige*, 37.)

4. Desnoyers, as well as Dequindre, is liable for the rents and profits of the trust property accruing since the execution of the trust deed, and should be ordered to pay the same forthwith to a receiver for the benefit of the creditors (*Sands v. Codwise*, 4 *J. R.*, 536; *Ib.*, 604, 605); and a court of equity will hold a trustee responsible for the consequences of a breach of trust, whether he derives any benefit *from it or not. (2 *Madd.* 350 *Ch.*, 113; *Adams v. Shaw, Schoales & Lefroy*, 272; 17 *Ves.*, 439; 2 *Story Eq.*, secs. 1268, 1269, *Ib.*, 1275, 1276.)

A court of equity will also hold a trustee responsible for losses resulting from a willful default. (*Osgood v. Franklin*, 2 *Johns. Ch.*, 27.) And where a trustee keeps a trust fund in his hands for a year, and omits to pay over the proceeds, the court will charge him with interest. (*Gray v. Thompson*, 1 *Johns. Ch.*, 82.)

A. D. Fraser, contra.

1. The deed was executed without the privity of any of the creditors; they are not parties thereto, nor ever assented to it, or until now claimed the benefit of it, and it was without any consideration. He may therefore revoke it.

Suydam v. Dequindre.

Where a person does, *without the privity of any one, without receiving consideration, and without notice to any creditor*, himself make a disposition, as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and that the general creditors or those named in the schedule are merely persons named there for the purpose of showing how the trust property, under the voluntary deed, shall be applied for the benefit of the volunteers. (*Garrard v. Lord Lauderdale*, 3 Sim. Ch., 1; *Walwyn v. Coutts*, 3 Meriv., 707; S. C., 3 Simons, 14.)

The deed in this case was a voluntary deed.

Dequindre was dealing with his own property for his own personal benefit and accommodation in paying his creditors as he thought proper. (*Page v. Broom*, 4 Russ., 6.) The creditors never submitted or assented to take the benefit of the deed, or conformed to its terms, or abstained from suing him in consequence. (2 Sugden, 187.)

If property be conveyed by a debtor in trust for the benefit of creditors who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor.

(*Acton v. Woodgate*, 2 Mylne & Keene, 492.)

351 *2. If the creditors are entitled to any benefit under the deed of assignment, the remedy is at law, as there is a covenant on the part of Desnoyers to execute the alleged trust.

If a trust is made, and no agreement to execute it, the trust is in equity, but if there is it is to be enforced at law. (*Baldwin*, 422.)

3. Even if complainants should be entitled to relief, and this should be the competent mode, yet it is insisted that this bill was prematurely filed—the bill being filed on the 9th of March, 1840, although the alleged trust did not expire till 24th April, 1840.

A plaintiff must have the right he asks when he puts his bill upon the file. (4 Russ., 355.)

Suydam v. Dequindre.

4. In any stage of the case the want of equity is fatal. (*Baldwin*, 416.)

THE CHANCELLOR.—On the twenty-fourth day of October, 1836, Dequindre, one of the defendants in this cause, made an absolute assignment and conveyance of certain real and personal estate to the defendant, Desnoyers, for the purpose of paying his debts, as designated in schedules attached to the deed of assignment.

The directions in the deed of assignment were that the trustee should sell at private sale, and that such portions of the property as should not have been sold at the end of eighteen months should be sold at public auction within two years thereafter. Among the creditors who were directed to be paid from the proceeds of such sale were the complainants in this cause.

Desnoyers, accepted the trust expressly, was a party to, and signed and sealed the deed of assignment at the time it was executed; but, as appears from the bill and the answers in the cause, has never either taken possession of the property or sold or disposed of any * part of it, or, indeed, done anything 352 toward carrying the objects of the trust into execution.

The two years within which he was to have closed the trust, by sale at auction, of whatever should not have been sold at private sale, expired on the twenty-fourth of April, 1840. On the ninth of March, 1840, this bill was filed for the purpose of either coercing the application of this property to the purposes expressed in the deed of trust, or to have it set aside and vacated. A preliminary objection was made that this bill was prematurely filed; but I have no doubt that after so long a time had elapsed, and after the trustee had refused to proceed in the execution of the trust, the complainants could institute proceedings to set aside the deed or compel the execution of the trust.

But this motion is resisted principally upon the ground that the deed of trust was voluntary, that the creditors were not parties to it, nor ever assented to it, and have not, until now, claimed the benefit of it; and, therefore, that Dequindre may revoke it.

Suydam v. Dequindre.

There is an apparent, and, perhaps, an actual conflict of the authorities on this subject.

The case of *Walwyn v. Coutts*, 3 Meriv., 707, seems to be the case referred to in subsequent decisions as the basis of this doctrine. 'In that case the deed of trust was voluntary and without the knowledge of the creditors, and, before assent had been expressed or any rights acquired, new deeds had been made, materially varying the trust, and, in fact, in substance revoking the first deed. The case of *Garrard v. Lord Lauderdale*, 3 Simons, 1, may be distinguished from the case under consideration. It was an indenture of three parts, the grantor, the trustees, and the creditors. The creditors had not executed the deed, and, before the bill in that case was filed or any assent expressed, a different disposition had been made of the property, and the assignment in fact revoked. Some other cases have been referred to to sustain this proposition.

On the other hand, the cases are numerous affirming a contrary doctrine, or, if not directly adverse, at least difficult to be reconciled with the cases before referred to.

In *Cumberland v. Codrington*, 3 Johns. Ch., 261, it is said that where a trust was created for the benefit of a third person, he may affirm the trust and enforce its execution.

It has also been held that when the deed of trust is absolute in its terms, the assent of the creditors is not required, that the relation of trustee and *cestui que trust* was at once constituted so that the assignor could not recall the deed. (*Ellison v. Ellison*, 6 Vesey, 656.) Many other cases may be referred to sustaining this ground. Without undertaking to reconcile the cases of *Walwyn v. Coutts* and *Garrard v. Lord Lauderdale* with the cases last above referred to (and it seems to me it would be difficult entirely to do so), it is sufficient to say that those cases differed in many essential particulars from the other class of cases, and also from the one under consideration.

The deed in this case is absolute in its terms; no assent of the creditors is required. Desnoyers, the assignee, positively and

Suydam v. Dequindre.

expressly accepted the trust. The property is, in fact, dedicated to the payment of the debts of these, among other creditors. Before filing the bill a portion of the creditors require the trustee to proceed in the execution of the trust, which he declines to do. The deed of trust is not revoked. No step of that kind is taken or intimated. The creditors find themselves estopped by this deed from collecting their debts by the ordinary course of proceedings at law, and the property remains sheltered and locked up in the hands of the assignee.

Under this state of things there can be no doubt that it is the duty of the court to enforce the execution of the trust or to set aside the assignment as intended to hinder and delay the creditors. The provisions of the assignment are fair and equitable, and such as there can be no objection to carrying into effect.

I am disposed to take the ground that where the conveyance is absolute, vesting the property in the assignee, as in this case, no express assent of the *cestuis que trust* is required—and, while the property remains unchanged, the *cestuis que trust*, although the instrument was made without their concurrence, may require and coerce the execution of the trust. I am inclined to the opinion that the relation of trustee and *cestuis que trust* was constituted at once on the execution of the deed, and that it could not afterwards have been revoked or varied except upon the expressed dissent of the *cestuis que trust*.

As to whether the trustee shall be required to proceed and execute *the trust, or a receiver be appointed, I have 354 had some hesitation, but, as it seems that the trustee, on being required, refused to proceed in the execution of the trust, and states that he accepted the trust only on condition that he should not be required to devote his personal attention to this business, it will be necessary that a receiver should be appointed, over whom the court can exercise a direct control.

I shall at present limit the order to the appointment of a receiver to receive the rents and profits of the assigned property, and, as the amount of debt has not been precisely ascertained, it

Suydam v. Dequindre.

will be necessary that a reference should be made to ascertain the amount still unpaid. And, as it cannot now be ascertained how much of this property it will be necessary to sell, the directions as to the amount to be sold, and the manner in which it shall be sold, will be reserved until the coming in of the report.

Order accordingly.

Ankrim v. Woodworth.

Joel L. Ankrim v. Samuel D. Woodworth.

Fraud: Remedy at law. Where the transactions stated in the bill, by which certain notes were obtained, presented a case of fraud, although, from the case made, it was doubtful whether the complainant could defend successfully the full amount of the notes, and a general demurrer was interposed, the court refused to sustain the demurrer, and required the defendant to answer.

1h 500
60 620

In cases of fraud where it is doubtful whether the defense would be good at law, the court of chancery will entertain jurisdiction. (a.)

Bill to annul and set aside a contract, and to compel certain notes to be delivered up and canceled. States that in February, 1839, complainant entered into an agreement with defendant to purchase certain lands which defendant represented as belonging to him, as being good land situated near a mill, with some thirty acres cleared or improved land. That in the spring of 1840 complainant executed to defendant three several promissory notes for fifty dollars each, payable in six, twelve and eighteen months, in consideration that defendant would cancel and destroy the agreement to purchase; that soon after he had executed the notes he ascertained for the first time that defendant had no title to a part of the lands contracted to be conveyed, that there was no clearing or improvement as represented, and that the lands were entirely different from what they were represented to be, and he charges that he was induced to enter into the contract by fraud. The bill further avers that there was no other consideration for the notes except as above stated, and prays that they may be decreed to be delivered up for cancelment.

To this bill the defendant demurred.

A. Davidson, in support of the demurrer.

J. S. Abbott, *contra*.

(a.) See *Barrows v. Doty*, *ante*, 1, and cases cited in notes.

Ankrum v. Woodworth.

THE CHANCELLOR.—The principal ground relied upon in support of the demurrer is that the facts stated in the bill would constitute a good defense at law.

The transactions stated in the bill, by which the notes were obtained, present a case of fraud, and for the purpose of this argument are admitted by the demurrer. It may, perhaps, be doubtful whether the complainant could defend successfully for the full amount of the notes.

In the case of *Hamilton v. Cummings*, 1 Johns. Ch., 356 523, the *rule is stated to be, that in cases of fraud, where it is doubtful whether the defense would be good at law, the court of chancery will retain jurisdiction. And a still stronger case is cited from *Peere Williams*, where the lord chancellor canceled a bond without sending the parties to law, although he was inclined to think the bond void at law as well as in equity.

There is another reason for retaining jurisdiction in this case, as the complainant is likely to be harassed with a series of suits upon these notes, confessedly fraudulent under the case made by the bill, and this, too, perhaps, after the witnesses may be beyond his reach.

Demurrer overruled, with leave to answer.

Jerome v. Seymour.

Edwin Jerome v. Charles Seymour.

Release of mortgage by quit-claim deed. Where the holder of a mortgage executes a quit-claim deed of the mortgaged premises to one who has received a deed thereof under an agreement that he shall pay the mortgage, the effect is to discharge the lien of the mortgage.

A subsequent assignment of the mortgage to a third person will not entitle the latter to enforce it.

The bill in this case states that on the 20th December, 1836, Cyrus Shepard executed to Horace R. Jerome two notes: one for \$240 payable in one year, the other for \$240 payable in two years; that on the sixteenth January he executed to said Jerome a mortgage to secure the notes.

That on the 2d of April, 1838, Horace R. Jerome sold and assigned the notes and mortgage to complainant, for the consideration of \$500. It then states that February 23d, 1837, Charles Seymour purchased the mortgaged premises from Cyrus Shepard, and they were conveyed, subject to the mortgage. That Seymour paid no consideration, except the notes and mortgage.

That immediately previous to the purchase, Shepard, H. R. Jerome and Seymour were the joint owners, and they were jointly building a saw mill. After the sale, above mentioned, Seymour owned two-thirds, and H. R. Jerome one-third, and they continued on with the work in 1837.

That Seymour, with intention to defraud H. R. Jerome, pretended to him that his deed of the mill property was defective, and desired said Jerome to make out a quit-claim, for the purpose of correcting errors and without intending to affect the mortgage and deed executed February 27, 1837.

Complainant states that Seymour paid no consideration for this quit-claim deed, and it was not supposed by said Jerome that deed would operate to release the mortgage; and that if

Jerome v. Seymour.

Seymour procured the deed for such purpose, or supposed it would effect such purpose, he fraudulently concealed the same from said Horace. That Seymour, both before and afterwards, promised Jerome he would pay the notes, and in the
358 fall of *1837, Seymour stated he had advanced more than his share towards the mill, and being so in advance, ought not to pay interest on said notes unless he had interest on the balance due him, and Seymour claimed a written stipulation, which Horace then gave him, not to charge interest in case Seymour paid said notes within some time there stated. The terms of said stipulation are demanded by said bill.

Complainant charges there is no balance due Seymour from Horace R. Jerome, independent of said notes; but that on the contrary, Horace R. Jerome claims a balance due from Seymour. In case Seymour claims a balance to set off against the notes, complainant offers to submit the matter to a master to state the accounts, and in such case prays that said Horace may be made a party. Complainant also states that in the winter of 1838 he attempted to settle with Seymour; accounts were exhibited, and Seymour examined and took a statement of the same; that he did not dispute his liability to pay the notes, but claimed he had a stipulation or agreement from Horace R. which exempted him from interest.

That he attempted again to settle in the winter or spring of 1838, as the agent of Horace, and the accounts were looked over at the house of complainant in Detroit; that the notes were talked of and admitted as a subsisting claim.

Complainant charges that both before and after the transfer of said notes and mortgage, Seymour has frequently admitted to complainant his liability to pay the notes; that Shepard, the maker, is insolvent, and a resident of the State of New York.

The defendant by his answer admits the indebtedness of Cyrus Shepard to Horace Jerome as stated in the bill; admits giving the mortgage to secure the debt, also the acknowledging and recording, and that the same was for purchase money.

Jerome v. Seymour.

Admits that complainant holds the assignment of the notes and mortgage, but *denies* that the same were assigned on the day stated, and *denies* that \$500 or any other sum was paid for the assignment. For answer says he was informed by the complainant that the notes and mortgage were given to him in the winter or spring of 1837, as agent to settle; therefore *denies* that complainant was ever the *bona fide* assignee.

Admits that said mortgage was on record at the time he bought out *Cyrus Shepard, and that Shepard gave 359 him a deed; but *denies* the same was subject to the payment of the mortgage, but states that such conveyance was in terms full and entire.

Admits that at the time of the purchase made of Cyrus Shepard, he had knowledge of the notes and mortgage. He also admits that he agreed to pay the mortgage, which agreement is in writing.

Denies that the agreement with Shepard to pay said notes and mortgage constituted the whole or a considerable portion of the consideration, but that he paid him some \$1,600 in money, and property besides. States that before the agreement to buy out Shepard a copartnership was formed, to wit, on the 20th day of December, 1836, between Cyrus Shepard, Seymour, and H. R. Jerome, which was in writing, one provision of which was that Seymour and H. R. Jerome should furnish each one-half of the means to erect a saw mill and dam, and reimburse themselves from the earnings.

Avers that it being understood that the description of the premises was defective, it was agreed if Seymour would buy out Shepard, Jerome would give a conveyance that was correct. About February 23, 1837, he did purchase Shepard's interest, and receive a conveyance; sets out the consideration, and refers to the agreement in writing.

Admits that immediately previous to buying out Shepard all three were joint owners and engaged in putting up the mill, and after the purchase, defendant owned two-thirds and H. R. Jerome

Jerome v. Seymour.

one-third, and that defendant and Horace R. continued their work through 1837.

That after the purchase it was proposed by said Jerome that new articles of agreement should be made, by which defendant should be obligated to advance according to his interest; this the defendant declined to do, but still proposed if H. R. Jerome would release the mortgage so that the property would be clear, etc., he would enter into such agreement; this was agreed to, and thereupon the copartnership agreement was made.

That on the same day, in pursuance of the original agreement, and in consideration that said defendant had entered into the agreement by which he bound himself to pay two-thirds of the expenses, and for the further consideration in said deed expressed,

the said H. R. Jerome, on the 27th day of February, 1837,
360 by deed signed by himself and *wife, quit-claimed two-thirds of the mill property to defendant, and the deed was acknowledged and recorded, and then in defendant's custody. Defendant admits the prior deeds were defective, also that he paid to the said Horace R. Jerome no pecuniary consideration for the execution thereof; that one object of the quit-claim was to correct the error. But denies all fraud, denies that the main object was to correct the error, but states the main object was to have the premises discharged from encumbrances, and Horace R. Jerome designed and intended in executing the quit-claim deed to discharge the mortgage.

Admits he promised H. R. Jerome he would pay the notes both before and after quit-claim deed.

Admits in November, 1837, he had an interview with H. R. Jerome at Flint concerning notes and advances, in which defendant claimed he had advanced more than his share, which said Horace R. admitted, and desired defendant to take said two notes and pass to his credit, but neither of said notes being due, and defendant wanting cash, he declined, saying they might come in after due. But finding he could get no money he agreed to take one; afterwards it was found the notes were at St. Clair. Then

Jerome v. Seymour.

he concluded to take both and apply them in the manner proposed, and drew upon the back of the statement of advances an agreement, on the part of H. R. Jerome, to deliver both notes, which was signed by H. R. Jerome. Defendant denies that any such stipulation in relation to said notes as stated in the bill was made at any time. Avers that after the above interview he went on in 1838 and made further advances, and by the winter of 1839 completed the mill and dam, and claims a large balance against H. R. Jerome over and above said two notes.

E. C. Seaman, for complainant.

Lee, Hale & Harding, for defendant.

THE CHANCELLOR.—From the statements contained in the answer I think there is a good reason to doubt the allegation that the complainant is the *bona fide* holder of the notes and mortgage in question.

*I should rather be inclined to the belief that he was 361 acting in the capacity in which he led the defendant to believe he was acting until a short time before the commencement of the suit, merely as the agent and attorney of Horace R. Jerome. But admitting him to be the actual holder of these papers, how would the case stand? As between the complainant and defendant, the present complainant can have no greater equity as agent of this defendant than could his assignor, H. R. Jerome.

That the property upon which the mortgage was based was discharged by the quit-claim, I entertain no doubt; that it was the mutual understanding and intention of the parties that such should be the operation and effect of the deed, must be conceded. The effort, then, to subject the land to the payment of the mortgage is out of the question.

But it is said that as a part of the purchase money to an amount equal to the notes remaining is in the hands of the defendant, the court should treat this as a trust fund, and enforce payment out of this to the present complainant. Shepard, the grantor of the defendant, is not a party in this suit.

Jerome v. Seymour.

It is true the defendant admits that he promised at the time of the purchase to Shepard, to pay these notes then in the hands of Horace R. Jerome, the assignor of the complainant.

In the course of their mutual dealings as copartners it was expressly agreed in writing that these notes should be credited to Horace R. Jerome and charged to the defendant in consideration of advances made by defendant to the said copartnership.

The agreement is in these words: "I am to deliver to Charles Seymour the two notes I hold against Cyrus Shepard for \$240 each, and charge them against the balance he may have furnished for the mill over his share without interest. H. R. JEROME."

It is averred that the advances were made to an amount greater than the notes.

How, then, can this complainant, standing in the place of H. R. Jerome, be entitled to a decree? If the notes which the mortgage was given to secure were the notes of the present defendant, negotiable, and negotiated before due, the defendant would
362 of course *have been liable upon them in the hands of the holder. But they are not the notes of this defendant, but of Shepard. The promise to take them up was made to Shepard while they were in the hands of H. R. Jerome, his partner.

According to the answer, which for this purpose must be taken as true, they were actually paid. Shepard is not a party to this suit, and it is not proper or necessary in this stage of the proceedings to decide what may be the equity between him and Seymour, but it is quite certain, as the case now stands, the present complainant is not entitled to a decree against defendant upon these notes.

I have had some hesitation as to what order to make. Whether to direct the notes and mortgage to be canceled, or to permit the cause to stand over with leave to make Horace R. Jerome a party, with the view to a settlement of the account for advances made by Seymour, as stated in his answer, which it was stipulated should apply in payment of these notes. The latter, perhaps, may be the safer course, and cannot prejudice the rights of either party. Let the order be entered accordingly.

Weed v. Lyon.

Nathaniel Weed and others v. James Lyon and others.

Recording acts of 1827. The act of April 12, 1827, entitled "an act concerning mortgages," prescribes the manner in which mortgages may be registered, and, being an act expressly in relation to mortgages, and general in its terms, is not controlled in relation to the record of mortgages by the act of the same date, entitled "an act concerning deeds and conveyances;" and a compliance with the first-mentioned act in the record of a mortgage is sufficient.

The bill of complaint in this case was filed November 16, 1840, and sets forth that on the 6th day of June, 1837, John Hale was indebted to complainants, in the sum of \$3,038.37, for goods, etc., and the said Hale, being seized of, or pretending to be seized of, the fee of lots 16, 17 and 18, on the Military Reservation, so called, on the south side of Congress street, in the city of Detroit, free from all incumbrance, executed, with his wife Felicite, a mortgage on the premises, which was recorded in the office of the register of deeds for the county of Wayne, on the 17th of June, 1837.

That default having been made in the payment of the bond and mortgage, a foreclosure was commenced by advertisement on the 17th day of June, 1839, and the lots were struck off to the complainants, and they became the purchasers, on the 31st day of August, 1839, and received a certificate from the sheriff, that, unless the land was redeemed according to law, the purchasers would be entitled to a deed in two years from the date of said purchase; that the certificate of sale from the sheriff was duly recorded in the office of the register of deeds of the county of Wayne; that the property had not been redeemed, and there was no probability of its being redeemed, as Hale, the mortgagor, was dead, and his estate insolvent, and complainants aver that they hold no other security for the payment of the demand or debt, or any part thereof. The bill then states that complainants were greatly surprised recently to learn there was a prior

Weed v. Lyon.

encumbrance in favor of the defendant Lyon, which was made about the 13th of November, 1828; and, upon examining

364 the records of Wayne county, they find such to be the *fact, and that certain proceedings were instituted in behalf of said Lyon, to foreclose the mortgage, and that the said premises were bid off on the 21st of November, 1838, and that the sheriff gave a certificate stating that James Lyon, the purchaser, would be entitled to a deed in two years, unless previously redeemed according to law. An assignment was made in January, 1840, to Thomas Beals, by Lyon, and the complainants charge that Beals or Lyon contemplate applying to the sheriff of the county of Wayne, for a deed, on the pretence that the premises have not been redeemed, thereby utterly disregarding the rights and interests of the complainants; and they charge, if such deed is procured, it would prejudice their claim on the premises.

The complainants then set forth that it was provided, in an act of the legislature, that there should be a city register's office in the city of Detroit, which law was in force at the time of the execution of said mortgage to Lyon, requiring it to be recorded in the city register's office, and declaring such conveyance to be fraudulent and void, unless it should be recorded in the city register's office before the "recording" of the deed or conveyance of a subsequent purchaser or mortgagee. They then state that at the time complainants took their mortgage they examined the city records, and that Lyon's mortgage never was recorded in the office of the city register, and that they had no knowledge of the same until June, 1840, and they claim that the Lyon mortgage should be considered as fraudulent and void.

Bill charges that the statutory foreclosure is void as against the complainants, for the reason that the mortgage of Lyon was not recorded in the city registry. And it prays that the mortgage made by Hale and wife to Lyon be adjudged null and void as against the complainants, or considered as subject to complainants' mortgage; and that the statutory foreclosure be set aside and declared void, and for other relief.

Weed v. Lyon.

The defendants demurred.

H. N. Walker, in support of the demurrer.

A. D. Fraser and *Geo. C. Bates*, *contra*.

THE CHANCELLOR.—The act of April 12, 1827, entitled “an act concerning mortgages,” prescribes the manner in which mortgages *may be registered. This being an act 365 expressly in relation to mortgages, and general in its terms, is not controlled in relation to the record of mortgages by the act of the same date, entitled “an act concerning deeds and conveyances.” Therefore, the record of the mortgage of Lyon in the county registry, according to the requirements of the act first mentioned, was legal and valid, and a constructive notice under the statute to any subsequent mortgagee or grantee of the same premises. As this conclusion upon the construction of these statutes is conclusive upon the equity of the case made by the bill, the demurrer must be allowed and the bill dismissed.

Bill dismissed.

Mack & Davis v. Doty..

Mack & Davis v. Ellis Doty.

Relief against judgment at law. This court will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant was ignorant of his defense, pending the suit, or the facts could not be received as a defense at law, or unless, without any neglect or default on the part of the defendant, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defense. (a.)

But where the defendants were prevented from making their defense at law by the acts of the plaintiff until the only witness, by which the defense could be proved, was dead, and a resort to this court, in consequence thereof, became indispensable, it was held that the complainants were entitled to relief in this court, and that it was not necessary for them to appeal the case at law, and then apply to this court for a discovery, in order to entitle them to equitable relief.

Where it appeared by the bill that the complainants became security for a third person to the defendant on two promissory notes, and that the defendant extended the time of payment three several times for ninety days each, without the knowledge or assent of the sureties, and the maker of the notes at the time of the extension was able to pay, but, at the time to which payment had been extended, he had become insolvent, and the defendant had commenced two several suits before a justice of the peace to recover the amount of the notes against the sureties, and they appeared and defended, and, after the testimony was taken, the defendant, who was plaintiff in the justice's court, discontinued his suits, and, after the decease of the only witness on the part of the defense, new suits were commenced, upon which judgments were recovered, the suits being undefended; upon demurrer, it was held that the case made by the bill was such as entitled the complainants to relief in equity, and that it was competent for this court to afford that relief in any stage of the proceedings, as well after as before judgments at law.

Demurrer to a bill for discovery and relief against judgments at law. The opinion of the court contains a sufficient statement of the case.

A. D. Fraser, in support of the demurrer.

The bill seeks to enjoin two judgments recovered before a justice of the peace by default.

(a.) See *Barrows v. Doty*, *ante*, 1, and cases cited in note.

Mack & Davis v. Doty.

The fact alleged might constitute a good defense at law if pleaded. No reason is assigned for not making a defense at law, nor does it appear why a discovery was not sought while the action was pending at law, and before judgment rendered.

It is conceded that the court would coerce a discovery in aid of inferior courts, and that the amount in controversy alone constitutes the test of jurisdiction. At all events it was the duty of the complainants *to have appealed to the circuit court, and then come to this court for a discovery.

(1 *Eq. Abr.*, 131; *Jer. Eq. Jur.*, 263, 269; 1 *Madd. Ch.*, 195; 1 *Chit. Dig.*, 591, etc.; 1 *Paige*, 287.)

This court will not afford relief against a judgment at law, on the ground of ignorance of facts, mismanagement of attorney, nor even when perjury has been committed. There must be a clear case of accident, surprise or fraud, before equity will interfere. (2 *Vern.*, 696; 6 *Johns. Ch.*, 87; 10 *Pet.*, 505; *Fonbl.*, 26, 27, 656, 657; 2 *Paige*, 321; 1 *Johns. Cas.*, 492, 502; 3 *Johns. Ch.*, 352; 1 *Johns. Ch.*, 51, 320, 395, 465; 4 *Ib.*, 510, 566; 7 *Ib.*, 135, 337.)

The parties should have put themselves in a situation to try the case by filing a plea. (6 *Johns. Ch.*, 430, 481.)

Goodwin & Hand, contra.

If an obligee does an act to the injury of the surety, or varies the terms of his obligations, or enlarges the time of performance without his consent, the surety will be discharged. (2 *Bro. C. C.*, 579; 6 *Dow.*, 540; 2 *Ves.*, 540; 10 *Johns.*, 587; 3 *Kent*, 111; 12 *Wheat.*, 554; *Chit. on Bills* (8th ed.), 442, and cases cited; 2 *Swanst.*, 539; 2 *Hov. on Frauds*, 71, and cases cited; 4 *Barn. & Cres.*, 506.)

The rules as to the relief of a surety are the same in a court of equity as in a court of law, when the facts are the same. (2 *Johns. Ch.*, 554; 17 *Johns.*, 384.)

When the sureties on the face of the instrument appear as sureties, the defense may be set up at law; when they do not so

Mack & Davis v. Doty.

appear, it is doubtful as to whether the defense be available at law; in such case the jurisdiction of a court of equity is undoubted, and in the other case this court would seem to have a concurrent jurisdiction, especially when a discovery is necessary. In this case the character of the complainants as securities does not appear on the notes. (4 *Barn. & Cres.*, 506; 2 *Swanst.*, 539.)

368 *THE CHANCELLOR.—The bill alleges that the complainants became sureties for one McKinney, to Doty, upon two promissory notes, for fifty dollars each. Doty, at three several times, extended the payment for ninety days each, without the knowledge or assent of the complainants. That, at the time said extension was granted, McKinney was able to pay, but, after the time to which payment had been extended by Doty had elapsed, was insolvent. That, at two several times, Doty commenced suits upon said notes before Robert Abbott, magistrate. That the complainants appeared and set up their defense, to wit, that they were sureties, and the extension of the time of payment by Doty. That the only witness to support their defense (the agreement to extend the time of payment) was one Sydney S. Hawkins (since deceased), who acted as the agent of McKinney in that behalf, and was on one occasion sworn, and gave his testimony; and, after the witness was examined, Doty discontinued his suit. That the parties appeared on both occasions, and were ready to make their defense, etc., and the suits were discontinued. That, after the decease of said Hawkins, the only witness, new suits were commenced, on which judgments were recovered, the said suits being undefended. To this bill there is a general demurrer. The ground of the defense is that this court will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question, pending the suit, or it could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of the defense.

Mack & Davis v. Doty.

This is undoubtedly the true rule; it has been frequently so held by this court. (See *Barrows v. Doty*, ante, page 1; *Wright v. King*, ante, page 12, and notes.)

It is insisted, however, that this case does not come within it. That the defendants below have been prevented from making their defense by repeated discontinuances, when the parties appeared to make their defense, until the death of the only witness. That, from the constitution of justices' courts, a continuance cannot be had for a sufficient time to obtain a discovery. That courts of chancery interfere with reluctance with inferior jurisdictions, and that this being *a case of 369 original chancery jurisdiction, this court should now entertain this bill and grant relief. In support of these grounds, the cases of *Rathbone v. Warren*, 10 Johns., 396; *Boyce's Executors v. Grundy*, 3 Pet., 214; 2 Swanst., 539, are cited. It is clear, from the case made by the bill, that the complainants were discharged from their liability. It is also undoubtedly true that courts of chancery have always sustained their jurisdiction in this class of cases. A court of chancery was formerly the only tribunal which could afford adequate relief. But recently courts of law have also given effect to defenses of this kind. The court of chancery, having originally exclusive jurisdiction, still retains it. But if the party has a good defense at law, and it is in his power to make it there, without a resort to this court, and he permits a judgment to pass against him, a court of chancery would not relieve him. It is apparent, from the case as made, that the defendants, by the act of Doty, after having two suits commenced, at two several times were deprived of making their defense, by the discontinuances, until the death of their only witness. That a resort to this court was indispensable, and that this necessity has resulted from the act of Doty, the plaintiff below. The only doubt in the case is, were the parties bound to apply to this court before judgment rendered in the court below. It has been urged that the defendants below could have taken appeals to the circuit court, and could have then applied to this court for a discovery,

Mack & Davis v. Doty.

and would have been entitled to their remedy. I have entertained much doubt whether this case comes within the exceptions to the general rule as stated in the case in *10 Johns.*, 590, and *3 Pet.*, 214. Was it necessary? was it incumbent upon the parties to adopt this more expensive and circuitous proceeding to make their defense, after having, on two several occasions, appeared, in both suits, made their defense, and produced their witness? I am inclined to think not. The necessity for a resort here at all has been caused by this extraordinary and unjust proceeding on the part of Doty, the defendant. In the case in *3 Pet.*, 214, where the court did relieve against a judgment, the judge, in delivering the opinion of the court, says: "It is not enough that there is a remedy at law, it must be plain and adequate; in other words, as practical and efficient to the ends of justice, and its prompt

370 administration, as the remedy in equity." He *says, also: "Although the defense might have been made at law, the complainant would still have been left to renew the contest upon a series of suits; and that, probably, after the death of witnesses." The case in *10 Johns.* was a case against bail, where the time had been extended. There had been a judgment in the supreme court against the bail, but relief still was granted. Here the complainants were prevented from making their defense by the act of the defendant. This was a case in which it would have been competent for this court to afford relief in any stage of the proceedings, and the resort here having been rendered indispensable by the act of Doty, it will be unjust and inequitable to permit him to take advantage of his own wrong.

Demurrer overruled.

Connor v. Allen.

Richard H. Connor and others, Administrators of Henry Connor, v. John Allen.

1h 571/
28 44

Partnership: Right of survivor to possession of assets: Receiver. A surviving partner having the legal right to the possession of the partnership property, the court will not deprive him of that right, unless upon proof of mismanagement or danger to the partnership effects.

Motion for receiver, affidavits on. Affidavits are not admissible to contradict the answer upon a motion for the appointment of a receiver.

The bill states that, in 1838, Henry Connor and John Allen were partners, owning certain mills and other property to a considerable amount; that they carried on the milling business as partners until September, 1840, when Connor died; that Allen had always been in actual possession and occupation of the premises, and still was in actual possession and occupation, and was running the mills and manufacturing lumber from logs cut on the partnership lands, and on the lands belonging to Connor alone, and was using and appropriating the proceeds to his own use and benefit; that complainants have been duly appointed administrators upon the estate of Connor, and, as such, are entitled to an account. And it prays for an account, injunction and receiver.

An injunction was granted.

The answer admits the partnership and the death of Connor, but states that the partnership is largely indebted to the defendant.

The defendant moved to dissolve the injunction on the coming in of the answer, which motion the complainants resisted, and moved for a receiver on the pleadings and affidavits.

The motions for a receiver and to dissolve the injunction both came on to be heard at the same time.

A. C. Smith, for complainants.

Van Dyke & Harrington, for defendant.

Connor v. Allen.

THE CHANCELLOR.—The answer denies the whole equity of the bill, and states the further fact that the partnership is indebted to the defendant in a considerable amount. The surviving partner having the legal right to the possession of the property, the court will not deprive him of that right unless upon proof of mismanagement or danger to the partnership effects. (*Gow on Part.*, 382.)

The affidavits are not admissible in contradiction to the
372 answer upon *the motion to dissolve the injunction, and the answer being full, the injunction must be dissolved. Affidavits may be read upon a motion for the appointment of a receiver. But I do not think the affidavits presented show such a case of mismanagement, or danger to the fund, as will justify the court in the appointment of a receiver under the rule as before stated.

Injunction dissolved.

Millerd v. Ramsdell, and Ramsdell v. Millerd.

Norton R. Ramsdell and others v. Jesse Millerd and others.

Jesse Millerd v. Norton R. Ramsdell and others. (Cross-bill.)

Answer, when responsive to bill. Complainant, by his bill, averred his right to certain shares in a partnership, purchased by him of the heirs of a former partner. The answer of defendant set up an agreement by which these shares were to be purchased by complainant for himself and defendant jointly *Held*, that as to this agreement the answer was not to be regarded as directly responsive to the bill, and, therefore, the agreement was not proved by it.

1h 373
62 450

Harring-
ton.
1h 373
72 554

Contract for lands: Specific performance. If an agreement for the purchase of lands be vague and uncertain, or the evidence in support of the same unsatisfactory, a court of equity will not enforce it, but leave the party to his remedy at law.

1h 373
98 581

Parol contract for lands: Part performance. Part performance, to take a parol contract for the purchase of lands out of the statute of frauds, should be of unequivocal acts that confirm the existence of the contract (a.)

Continuance of partnership business after death of one: Rights of representatives of deceased partner. Where one of several partners dies and the business of the copartnership is carried on by the surviving partners without the assent of the representatives, they have as a general rule their election to demand interest on the amount of the share of the deceased, or to take a share of the profits; but where the interest of the deceased partner had become vested in one of the surviving partners, who consented to the continuance of the copartnership, it was held the rule did not apply, and his only right was to share as partner.

The original bill in this case was filed in June, 1837, by Salmon H. Matthews.

In July following, a cross-bill was filed by Millerd, the principal defendant in the original suit; answers were put in to the two bills by Matthews and Millerd respectively; as to the others, the bills were taken *pro confesso*.

Subsequent to the putting in of the answers in both cases, Matthews died, and the suits were revived and continued by and against his personal representatives, Norton R. Ramsdell and Asa Williams, administrators, and Arabella Matthews, administratrix.

(a.) See *Burch v. Hogge*, *ante*, 31, and cases cited in notes b and c.

Millerd v. Ramsdell, and Ramsdell v. Millerd.

The case will sufficiently appear from the cross-bill and answer.

It appears from the cross-bill that in November, 1835, Matthews and Edwin Bond, one of the defendants, entered into a copartnership with Millerd. The articles of copartnership were reduced to writing, and are as follows :

"This article of agreement, made the first day of November, 1835, between Jesse Millerd, late of Auburn, N. Y., and Salmon H. Matthews and Edwin Bond, of Dexter village, M. T., witnesseth, that the said parties have this day mutually entered into a copartnership, under the firm of J. Millerd & Co., for

374 the purpose of carrying * on the mercantile business and the grist mill and saw mill business, and all other business which may be, by said firm, considered necessary in connection with said branches to promote the interest of said firm, for the term of four years from the above date, on the following terms, viz: their capital is to be \$21,000, or \$7,000 to each person.

"The said Matthews and Bond now own in the said village of Dexter, a grist mill and saw mill and tavern stand, and the necessary buildings thereon, containing about five acres of land, more or less, according to their deed of said property, executed to them by Samuel W. Dexter, on the 7th day of April, 1834, which property, together with the appurtenances and water privileges thereunto belonging, is estimated at fourteen thousand dollars, which the said Matthews and Bond are to furnish as a capital for the benefit of said firm, as their shares, and for which, whatever may be due, or to become due to said Dexter, they, the said Matthews and Bond, are themselves to cause to be punctually paid to the said Dexter, without cost or inconvenience to the said firm or the said Millerd.

"And the said Millerd is to furnish seven thousand dollars worth of goods as his share of said capital stock of said firm, and the said partners are mutually bound to each other to do and perform all necessary services in their power, for the promotion of the above business. All the loss or gain to said business is to be

Millerd v. Ramsdell, and Ramsdell v. Millerd.

mutually shared by the said partners, and all necessary expenses in said business are to be borne by the said firm, from and after the said date first above mentioned.

"And, as the said Matthews and Bond are indebted to the said S. W. Dexter for the said premises and for the payment of said debts, they have executed a bond and mortgage to the said Dexter for payment thereof, and as the said Millerd on his part furnishes his share of the said capital stock at the commencement of said firm: Now, therefore, it is hereby agreed by said Matthews and Bond, that they will, for the purpose of securing said Millerd against any loss he might sustain by their failing to pay for the said premises, according to the condition of said bond and mortgage, execute to him, the said Millerd, a warranty deed of the said premises; and they, the said Matthews and Bond, also agree, that in case of their failure *as aforesaid, to 375 make payment for said premises whereby the said Millerd's interest shall be injured; that then, in such case, he shall have a claim to secure himself from any personal property in the possession of said firm, or from the property owned by either or both of the said Matthews and Bond in their private capacity.

"In witness whereof, the said parties have hereunto set their hands and seals at Dexter village, on the date first above mentioned, in presence of CHAS. D. MILLERD.

(Signed)

"J. MILLERD.

S. H. MATTHEWS.

EDWIN BOND."

The cross-bill states that Matthews and Bond were at the time of executing said agreement joint owners of said real estate, and copartners in the grist and saw mill business and tavern, under the firm and style of Matthews & Bond; that said firm were then indebted to different persons in a considerable amount; that by the formation of said copartnership the firm of Matthews & Bond was dissolved.

That Millerd did furnish his share of capital according to agreement, and the goods were placed in the store of the firm.

Millerd v. Ramsdell, and Ramsdell v. Millerd.

That Matthews and Bond did, in pursuance of the agreement on their part to furnish, etc., on the 12th. of January, 1836, execute to Millerd a deed of one undivided third of said real estate.

That at the time of the execution of said agreement, said Matthews and Bond proposed to Millerd that he should become joint owner with them of another parcel of land in Dexter, on which was a dwelling house and store, etc. (the Brower lot); that Matthews and Bond then held a deed of same, but had not paid the purchase money; that it was agreed that Millerd should own one-third of it and pay one-third of the said purchase money; that the same was included in the said deed from Matthews and Bond to Millerd; that part of said purchase money had since been paid out of the partnership funds, the remainder not yet paid and not all due.

Sets out the covenants in said deed on the part of Matthews and Bond, which are :

1. Seizin in said Matthews and Bond.
2. Freedom from encumbrances, except a mortgage to Dexter of \$10,750.
3. That said Matthews and Bond would pay said mortgage and indemnify Millerd against the same.
4. Right of said Matthews and Bond to sell.
5. Covenant of warranty.

That said deed was intended as an absolute conveyance of said one-third; that said Matthews and Bond have never executed any deed as security to Millerd, as against the Dexter claim.

That the partnership commenced immediately on executing the agreement, and that the goods were offered for sale in the store of the firm; that the same had been replenished from time to time, by and on account of the firm; that Matthews and Bond had at all times participated in the profits thereof.

That Matthews and Bond were not acquainted with the mercantile business, and therefore chose to attend to the other branches of the business of the firm, and that Millerd attended principally to the store.

Millerd v. Ramsdell, and Ramsdell v. Millerd.

That regular invoices were made of the \$7,000 worth of goods, and copied into a book in the store; and that similar bills were made of the goods since purchased; and that all of the bills or invoices were kept in the store with the other papers of the firm; that books of account and a cash book, etc., were kept in the store, and remained there up to 27th of June; and that Matthews and Bond had access to them at all times; that said invoice book was delivered to Matthews at his request; that Matthews carried it away, and still has it.

That in the summer of 1836, an addition was built to said tavern house by the firm, and out of their funds, at an expense of about \$1,000; that during the same year a store was in the same way built on said five acres of land, at an expense of about \$3,000; that no account was kept of the expense; that about the 1st of September, 1836, a contract was made by Millerd and Matthews in the name of the firm with one J. Ranney to sell him a village lot for a tannery, being part of said five acres, which contract the parties agreed to reduce to writing at some future time; that the same has not yet *been done, but that 377 said Ranney has taken possession of the lot by the concurrence of said Matthews and Millerd, and paid part of the purchase money, for which receipts were given in the name of the firm, and the money appropriated to the use of the firm; charges that all this was done with the consent and approbation of Matthews, and that Bond, during his lifetime, and Matthews and Millerd did agree during his lifetime to build said addition and said store.

That said firm did, about the 12th of January, 1836, purchase of S. W. Dexter certain premises and water privilege, contiguous to the village on Huron river, for \$3,000, and took a warranty deed; that the whole of the purchase money is yet unpaid and not yet due; that at and previous to the commencement of the partnership, Matthews and Bond were negotiating with Dexter for the purchase from him of one-half the unsold lots of Dexter village, and also forty or fifty acres of land north of said village;

Millerd v. Ramsdell, and Ramsdell v. Millerd.

that it was agreed between Matthews and Bond and Millerd, that the latter should be admitted to participate in said purchase; that the same was not consummated during Bond's lifetime, but that after his death Matthews and Millerd completed the purchase in their own names, and a contract for the same was executed by said Dexter, Matthews and Millerd, whereby Dexter obligated himself to execute to Millerd and Matthews a deed of the same upon the payment of \$2,000; that the same is still unpaid; that the said premises have risen in value and are now worth at least \$7,000.

That in January, 1836, Millerd had occasion to go to the State of New York after his family, and to purchase goods for the firm; that it was agreed between all the parties that he should go, and that the business should be left in charge of Matthews and Bond, and the clerks; that Bond died during Millerd's absence, in April or May, 1836; that Millerd was on his return when he heard of his death, and immediately returned.

That after Bond's death, Millerd and Matthews agreed to continue the business of the partnership under the same style and firm as before, and for their joint benefit; that they did so; that Bond left certain heirs; that soon after his death it was agreed between Matthews and Millerd, that Matthews should purchase

of the heirs their shares or interest in said concern, and

378 pay for the same out *of Matthews' own funds; that

Millerd should pay Matthews one-half of the purchase money and expenses; that Matthews should proceed to buy out the same on the best terms he could, in the names of Matthews and Millerd, and for their joint benefit; that Matthews should be allowed to absent himself a sufficient time for that purpose.

That in September or October, 1836, Matthews left Dexter to go to Massachusetts for the purpose of buying out the heirs living there, for their joint benefit.

That Matthews did fraudulently purchase of some of the heirs their interests, and took deeds therefor in his name alone; and that Matthews claims that by virtue of said deeds he is entitled to

Millerd v. Ramsdell, and Ramsdell v. Millerd.

six undivided ninths of said real estate; and in right of his wife to a life estate in another ninth; and also claims to be beneficially interested in seven-ninths of the personal property of Bond, and that these claims are founded on the following deeds and releases:

From Richard Bond and wife; from S. W. Dexter and wife; from J. Carrier and wife; from Q. Hitchcock and wife; from A. Williams and wife; from Hannah Bond.

The names and residence of Bond's heirs are given; that Russel Cooley is guardian of certain heirs named, who are minors.

That Matthews has been appointed administrator of Bond.

That soon after Bond's death, his brother King E. Bond died, leaving his wife and two children heirs; R. Cooley is his administrator.

That since Matthews' appointment as administrator of Bond, he and Millerd have continued the business as before.

That Millerd has never drawn from the partnership more than his share of the profits.

That soon after Matthews' return from Massachusetts, Millerd learned for the first time that Matthews had taken the deeds in his own name; that Millerd trusted to his good faith, and was not alarmed, until about February, 1837, when in a conversation with Matthews, *Millerd learned for the first time 379 that he intended all of said purchases for his sole benefit.

That the real estate has risen in value greatly, and is worth, besides the erections recently made, \$17,000.

That Matthews, as part of the consideration of said purchases, assumed the debts due from the firm of Matthews & Bond.

That the amount of consideration expressed in the several deeds from the heirs is \$900; that Millerd has offered to pay to Matthews one-half of all the cost of said shares, and demanded a deed of one-half thereof; that Matthews refused to make the deed.

That about the 10th of June, 1837, Millerd was taken ill and was confined to his house two weeks; that when he left the store there was a large stock of goods on hand—about \$10,000 worth—

Millerd v. Ramsdell, and Ramsdell v. Millerd.

account books, bills, notes, etc., etc., to the amount of \$15,000 or \$20,000, and about \$2,000 in cash.

That about the 19th of June, 1837, Matthews took from the store \$1,000, for the purpose of paying a bank note at Washtenaw bank due from the firm; that Millerd learned afterwards that he had not paid the same.

That on Sunday evening, June 25, Matthews removed the books and papers from the store, and also the keys to the safe, and on Monday Matthews dismissed the clerk and employed another.

That at this time there was in the store about \$1,050 in cash.

That during Millerd's illness, Matthews took and appropriated to his own use large sums of money.

That on the 28th of June Millerd called at the store, and was denied access to the books by Matthews, and prevented by force from making any examination.

That there is no person in the store or mills to look after the interests of Millerd; that Millerd is unable to attend to the same in person; that Matthews refuses to permit any one, etc.; that the cash receipts in the store are about eighty dollars per day, and that on the evening of June 27th there was in the store \$800 in cash.

That Matthews is illiterate, and incompetent to carry on the business of the firm.

380 *Prays for an account; that Millerd may be decreed entitled to one-half of the profits since Bond's death; for the establishment of said deed from Matthews and Bond to complainant as an absolute conveyance; that Matthews be decreed to convey to complainant one-half of the real estate purchased of Bond's heirs; for a partition of the real estate or sale; for a dissolution of partnership, and for the appointment of a receiver; for an injunction upon Matthews.

The answer of Matthews admits the copartnership and the articles.

Admits that previous to and at the time of executing said

Millerd v. Ramsdell, and Ramsdell v. Millerd.

articles, the defendant and Edwin Bond were joint owners of the five acres of land in bill mentioned, and were copartners in grist and saw mill and tavern stand under the firm of Matthews & Bond, and that the firm were then indebted as in the bill mentioned, and that by the formation of said firm of J. Millerd & Co., the firm of Matthews & Bond was dissolved.

Denies that complainant ever furnished as his share of the capital stock \$7,000 worth of merchants' goods; admits that complainant did, shortly after the execution of said articles, furnish and place in the store of the firm a stock of goods not exceeding, as defendant verily believes, \$4,000 or \$5,000 worth, and by far the greater proportion thereof were remnants and other refuse goods of an old stock unsuitable to the demand, and different in nature, quality and value from what the complainant had promised to put into the partnership, *and such as did not, 381 according to their agreement, entitle him to one-third of the rents of the mills and tavern, the said agreement in fact imposing on complainant an obligation to furnish a substantial and fresh stock of goods suitable to the wants of the country, and worth at first cost prices and transportation \$7,000.

Admits that after the execution of the articles, and in pursuance of the agreement therein, defendant and wife and Edwin Bond executed a deed in fee simple of one-third of the five acres as in the bill stated, but says that the deed, though absolute in terms, was not intended to be so in fact, but only to operate as a security to indemnify complainant against the claim of S. W. Dexter in the articles mentioned; and to a participation of one-third of the rents and profits of said property for four years; and complainant acquired an estate therein only for the aforesaid purposes upon the express condition that money to pay Dexter should be drawn from the partnership funds, and on the faith that complainant would fully comply with his aforesaid contract by delivery of the stipulated stock of goods, etc., and the property was estimated at a price below its real value, on the further faith that the goods would be of the quality and prices before men-

Millerd v. Ramsdell, and Ramsdell v. Millerd.

tioned; and states that the deed was drawn by complainant; does not recollect what the covenants were.

Admits that at the execution of the copartnership articles, defendant and Bond proposed to complainant to become jointly interested with them in the Brower lot; that defendant and Bond then held a deed therefor as in bill stated, and subject to the payments therein mentioned, for which three weeks' notice was given. That complainant, at the time mentioned in bill, concluded to purchase and pay as therein stated, and that the first of said notes has been paid; the others are unpaid, and only one due.

That defendant cannot state positively what covenants are contained in the deed, but believes they are as set forth in the bill; denies that defendant and Bond, or either of them, have executed to complainant a warranty deed of the premises mentioned in copartnership articles except as security; avers that there
382 never was any conversation *between the parties by which complainant was entitled to any other deed than the one he received, nor was there ever any complaint by complainant that he had not received all and every deed he was entitled to.

Avers that complainant has in fact received the deed mentioned in the articles of agreement and none other, and for the sole purpose therein mentioned, and he never demanded any other.

That the copartnership of J. Millerd & Co. commenced immediately on the execution of the articles of agreement, and goods of said firm were sold at their store and replenished from time to time from different places, but to what extent defendant cannot state; that defendant has received or expects to receive his own share of the profits, and also seven-ninths of those due to Bond at his death, to which he is entitled in virtue of the several assignments, as also two-ninths more which he has this day purchased, being all of said Bond's interest, but denies that complainant put in \$7,000 worth of goods, or that defendant has shared in the profits of such an amount.

Admits that defendant and Bond were unacquainted with mercantile business, and that he chose to attend to the other branches

Millerd v. Ramsdell, and Ramsdell v. Millerd.

of the business, and that complainant should give his attention to the store, intending thereby that such attention should be proper, etc., and that complainant would be responsible for such attention, but defendant avers that the store has been very inadequately and improperly attended by complainant and sons, to the detriment of the concern.

Denies that regular and correct bills or invoices were made of the \$7,000 worth of goods, so said to be furnished by complainant, and were copied into a book in the store; denies that the stock was at all furnished. Defendant says he never knew until the time hereinafter mentioned, that an invoice or bill of any kind had been made by complainant of the goods which he did furnish; says that no bills of the goods so furnished were ever made out by the persons who sold the same to complainant, as defendant verily believes, and if they were made out they were never shown to, or seen by defendant, and defendant believes and avers that there never was a just and true invoice made out by complainant, or on his behalf of said goods. *But defendant 383 admits that about the sixteenth of June last, complainant showed defendant a small book purporting to be an inventory of goods made out at Auburn, New York, which was made out chiefly in gross sums, omitting the details necessary to render it satisfactory, and to test its correctness; that the entire was made out by complainant without reference to original bills, but with a view to establish a particular result, and afforded no evidence of the actual amount; that this was all the invoice ever shown to defendant, and he believes the same was not completed until long after the commencement of the copartnership; that the defendant retained same in his possession a few days, when he returned it to complainant, or into his possession at the store, about the twentieth June last, and defendant believes the same is now in the store or in complainant's possession. Defendant believes that bills were made of the goods since purchased at New York and elsewhere, and that all of said bills have been kept with the other papers of the firm in the store.

Millerd v. Ramsdell, and Ramsdell v. Millerd.

Denies that regular books of account of all sales or credit made at said store were kept, or that any of the other books mentioned in bill were regularly kept, but admits that books purporting to be those in the bill mentioned, and for the time therein stated, were kept, not in a regular, business-like manner, but very irregularly, defendant believing that not more than one-tenth of the several accounts purported to be kept thereby were in fact entered on said books.

Admits that all the books were kept in the store, and were open to inspection of defendant and Bond, with exception of said invoice book, which was, at defendant's request, delivered to him for the purpose in the bill alleged, and was returned by defendant.

Denies that the defendant or Bond had the control of any of the books, although they were open to their inspection; they remained in the exclusive possession and under the exclusive control of complainant, or his sons, who acted as clerks in the store, and although they were nominally clerks of the company, yet they in reality consulted their father's interest in all cases when that was at variance with the interest of the other partners.

Admits the building of the addition to tavern and the store, both after Bond's death, at the time and expense stated in the bill.

Admits the contract of sale of a village lot to Julius

384 Ranney as in *bill stated; says that complainant's participation in said transaction arose not from his right as a proprietor in the lot, but from his interest as a partner, and of the firm having a temporary and qualified interest as before stated, which rendered his assent necessary.

Admits that said lot was taken possession of, and part of the purchase money paid, receipted and appropriated as in the bill stated, but that defendant consented to such appropriation not from any right of the firm thereto, but because same was small in amount; that at the time of the contract defendant told Ranney that the company could not give a deed, but that at some future time defendant individually would see that he received a deed.

Admits that the addition to tavern and store were built and

Millerd v. Ramsdell, and Ramsdell v. Millerd.

paid for, and said lot sold and receipts for purchase money given in all particulars as stated in the bill, and that the parties therein mentioned did agree to erect said buildings.

Admits the purchase from Dexter as in the bill stated; that the deed is in defendant's possession; the purchase money yet unpaid, and no part due at time of filing the bill, but defendant believes one payment has since become due.

Admits that at and previous to the commencement of partnership, defendant and Bond were in negotiation for the purchase of village property of Dexter as in bill set forth, and the agreement between complainant, defendant and Bond, as in the bill stated, and that the purchase was not consummated during Bond's lifetime, and states it never was consummated, but the agreement then made fell through, and a new bargain was made therefor after Bond's death; that the premises were purchased by complainant and defendant, not in their copartnership character, but as individuals; admits that complainant and defendant did complete the purchase as stated in the bill, and that the contract was then in defendant's possession; admits that the premises have risen in value; cannot say whether they are worth at least \$7,000, but believes they are worth \$5,000.

Admits that complainant had, as he alleged, occasion to go to the State of New York at the time and for the purposes mentioned in bill, and that defendant made no objection thereto, though he conceived complainant's going to be in violation of their copartnership articles; defendant regarded his departure as being caused in reality by the necessity *of moving his 385 family, and that the purchase of goods was only a pretext; that if such purchase was really necessary it was in consequence of complainant having failed to furnish his \$7,000 worth of goods; that though there was no express agreement, as mentioned in the bill, in regard to conducting the business during complainant's absence, yet it was generally understood as unavoidably resulting from such absence that the store should be left in charge of the defendant, and Bond and the clerks; and that

Millerd v. Ramsdell, and Ramsdell v. Millerd.

defendant and Bond should take charge of the other branches of the business, and that complainant should be permitted to take the journey.

Admits that Bond died at the time mentioned in the bill; defendant does not know whether complainant was on his return when he heard thereof, but admits that he did return soon after.

Admits that after Bond's death, defendant was under the impression from the representation of others that he was bound to continue the partnership to the end of the four years, and under that impression he did continue the business with complainant, without any new agreement, for their joint benefit and under the same firm name as before, and the business was continued and carried on as before; denies that it was under any new agreement independent of the original articles.

Admits that Bond left heirs; denies wholly any agreement or conversation in reference to the purchase of their rights for the joint benefit of complainant and defendant; that defendant has, since Bond's death, purchased of the heirs, and become entitled to the whole of Bond's interest, and that the same was purchased for his sole benefit.

Admits defendant's leaving Dexter at the time, and for the purpose in the bill mentioned, and that he procured from Bond's heirs, deeds and releases, to be executed to him in his own name, and that he claims as in the bill mentioned; denies that his so doing was in violation of agreement, or with intent to deceive or defraud complainant.

Admits that defendant derives his said claims under and by virtue of the several deeds in the bill set forth.

Admits that Bond's heirs are correctly set forth in bill, and that defendant is administrator of said Bond, and that King E. Bond died intestate, leaving the persons named in the bill his heirs.

386 *Admits that ever since defendant's appointment as administrator of Bond, he has continued the business with

Millerd v. Ramsdell, and Ramsdell v. Millerd.

complainant; but defendant did so in his individual, and not in his official capacity as administrator.

Defendant believes complainant has drawn more than his share of profits, and therefore denies that complainant has never drawn more than his share.

Defendant cannot form any belief whether or not, soon after his return from Massachusetts, complainant learned for the first time that defendant had taken deeds in his own name, nor whether he relied on the good faith of defendant, and was not alarmed, etc., nor whether, until the conversation in the bill mentioned, complainant learned that defendant intended all of said purchases for his own benefit.

Defendant believes that complainant never entertained the least idea that any of said shares were purchased for his benefit.

Admits that since November, 1836, the real estate mentioned in the deed from defendant and wife and Bond to complainant has risen in value, independent of the erections thereon; defendant cannot say how much, or whether they are worth the sum mentioned in the bill.

Denies that defendant ever told complainant that, on the purchase of the rights of Bond's heirs, he assumed as part of the consideration of the purchases the payment of the debts due from the firm of Millerd & Bond, and that the consideration expressed in the deeds was the amount actually paid over and above the debts; that such was not the fact; but defendant admits that he may have told complainant that as part of the consideration he was to assume the debts, but the amount of consideration expressed in the deeds was inserted in a round sum, without regard to the sum actually paid, which in some instances exceeded the amount stated.

Admits that the whole amount of consideration expressed in said deeds is two hundred and fifty dollars; but, for the reasons before stated, defendant wholly denies and repudiates the pretended claims of complainant to any participation in the property acquired by said purchases, and denies that complainant, by

Millerd v. Ramsdell, and Ramsdell v. Millerd.

virtue of any agreement with defendant, and of any right as surviving partner, and by paying to defendant the half of
387 the sums in the bill mentioned, or otherwise, *would be entitled to half of said property, or any part thereof.

Denies that any tender was ever made as stated in the bill, but admits that, at or about the time stated in the bill, complainant did make the demand stated in the bill relative to said property, and that defendant refused.

Admits the illness of complainant, as stated in the bill, and that the store was left in care of his two sons, and there was in the store a large stock of goods. Does not know the amount, or of what they consisted. Also, books of account, notes, etc., together with a certain sum of money. Defendant cannot set forth the particulars or amount; all such matters remained under the control and management of complainant, as well during his temporary illness as before.

Admits that defendant did take the sum of one thousand dollars as stated in the bill, and for the purpose therein mentioned, and which was not a mere pretence, but that he did actually pay the bank note therewith.

Admits that defendant did enter the store in the absence of complainant and the clerks, as stated in the bill, and put into an iron safe therein the books, notes, etc., and removed the key of the safe in which the money was kept, but all this was done in pursuance of the consequences of the writ of injunction, etc., and in accordance with the prayer of a bill which defendant was coerced to file by the conduct of said complainant, etc., and because defendant apprehended if he had notice of the issuing of the writ, he would seize upon the portable and valuable property of the firm, etc., and defendant, in order to protect them, locked them up, and after service of writ removed the same to his house, the complainant having obtained a key of the safe, and dismissed complainant's sons, as stated in the bill, because he had not confidence in them, and placed in said store a competent and trusty clerk, and assumed the entire control and management of the

Millerd v. Ramadell, and Ramadell v. Millerd.

business; defendant submits that he was justified, etc., and exercised only his legitimate power.

Admits that at that time defendant received from the safe in said store, about sixteen hundred dollars.

Admits that during complainant's illness defendant took and appropriated *to his own use various sums of 388 money, as he was justified in doing by virtue of his rights as a partner, and by virtue of articles relative to the purchase of the Brower lot; all of which were entered upon the books; avers that the whole did not exceed the proportion of defendant.

Admits that on the twenty-eighth of June, defendant being in possession of the store, complainant did call at the store and requested as stated in the bill, and that defendant did refuse said requests, which he was induced to do because he wished to make an inventory thereof previous to the access of complainant thereto, whom he suspected of a design to alter the same and make entries thereon, which entries complainant did afterwards make as hereinafter stated, and defendant did not think complainant was entitled to have access to the books until they were in the hands of a receiver, and defendant removed them to his own house until a receiver was appointed, and then delivered them to him.

Denies that there was no person in the employment of the firm to take care of the interests of complainant; that defendant employed a trusty and competent clerk to act for the entire concern, and gave his own time and attention to the business, but defendant did, as stated in the bill, refuse to permit any person appointed by complainant to attend, etc.

Admits the receipt of money and the state of funds as stated in the bill.

Admits that defendant, though not an illiterate man, is unacquainted with the mercantile business.

Denies that complainant has any well grounded apprehensions of being defrauded by defendant.

Admits that no account was ever settled between them. Defendant avers that complainant has, during the partnership, applied to

Millerd v. Ramsdell, and Ramsdell v. Millerd.

his own use sums of money, and exceeding his proportion, to an amount unknown to defendant; and that he permitted his sons, being minors, and irresponsible, to take out of store goods, and charged them to their account; and also that complainant furnished articles for the use of the concern, and charged more than they were worth.

Insists and avers that the partnership was dissolved by
389 Bond's death, *and all of complainant's right to a share of the profits of mills, etc., became extinct.

Admits that complainant, although not entitled to any participation in the fee of said real estate, is entitled to an account of the proportion of his funds, if any, drawn from said concern, for improvements of said estate; but defendant says that said sums should have been charged to him and Bond, and, if not already charged, should now be so charged, etc.

Admits the institution of proceedings in this court, as stated in the bill, and that a receiver has been appointed, to whom defendant gave up the premises, books, money, etc., and the receiver now conducts the entire business.

That complainant, having expressed anxiety to help the receiver, and been permitted to have access to the books, took advantage thereof to make some entries thereon, materially affecting the nature and statement of some of the accounts, and did the same in a clandestine illegal manner; defendant does not know the nature or amount thereof.

Defendant prays the dismissal of complainant's bill, and the relief prayed by the defendant's original bill.

General replication filed, and the case brought to a hearing on pleadings and proofs.

G. Miles and A. L. Millerd, for complainant.

Kingsley, Fraser and Romeyn, for defendant.

THE CHANCELLOR.—It is not necessary in this stage of these causes to enter at length into a detailed statement of the plead-

Millerd v. Ramsdell, and Ramsdell v. Millerd.

ings, and the very voluminous proofs and exhibits which the cases present.

The first question presented, which it is necessary to decide before the accounts are stated, is, did Millerd comply with the conditions of the articles of copartnership by furnishing goods to the amount of \$7,000, and thus entitle himself to the one-third of the real estate, and to an equal share of one-third in the effects and profits of the copartnership. *An 390 inventory is exhibited, by which it appears that the cost of the goods furnished by him was \$5,389.54, exclusive of the cost of transportation, insurance, etc., and that a general charge was added of thirty-three and one-third per centum for freight, purchase of goods, insurance, etc., making \$1,796.51, which two sums make in all \$7,186.05.

It appears by the proofs in the cause that from eight to ten per cent should cover these charges.

It becomes necessary to determine the question whether the goods thus furnished were accepted and received by Matthews and Bond as a fulfillment of this part of the agreement on the part of Millerd. It may be proper to say, from my view of the terms of the contract, that if Matthews and Bond had dissented at the time the goods were furnished, and had refused to proceed further until the question of the amount to be charged for purchasing the goods, freight, etc., had been settled, and the deficit supplied, they would have been entitled to have the amount of goods stipulated for, at cost and reasonable charges and expenses, without any addition by way of profit.

But, from the testimony of King and C. D. Millerd, confirmed to some extent by that of John Williams, there are strong grounds of probability that the exhibit, containing an inventory of the goods, and in which this charge of \$1,796.51 occurs, was the one used at the time the goods were received at Dexter.

The testimony of Cyrus Loomis of the admission of Matthews that Millerd had fulfilled on his part, confirmed, as it is, by the prominent fact that the deed of the one-third part of the prop-

Millerd v. Ramsdell, and Ramsdell v. Millerd.

erty was executed by both, Matthews and Bond some time after the goods were received, without any further stipulation or reservation, altogether furnish a very strong presumption that the parties themselves regarded this part of the contract as fulfilled and settled. Whatever may have been the fact, in a doubtful question of this kind, it is much the most safe to abide by the unequivocal acts of the parties themselves, than at this late period to attempt to open this matter.

That the parties executed and delivered the deed admits of no doubt.

391 * As to the alleged agreement for the purchase of the interests of the heirs of Bond:

It is urged that this agreement is made out by the answer of Millerd, and that it is taken out of the statute of frauds by part performance. Millerd, the defendant in the first suit, and complainant in the other, insists, in his answer in the one case and in his bill in the other, that it was agreed between himself and Matthews, after the death of Bond, that the interests of the heirs of Bond should be purchased by Matthews for the benefit of both. This is denied in the most positive terms by the answer of Matthews in the second suit. It was insisted at the argument that Millerd's answer, being responsive to the bill and not disproved, must be taken as true. Matthews alleges, in his bill, his right to certain shares purchased of the heirs of Bond. This Millerd denies, and, by way of avoidance, sets up this independent contract by way of showing himself entitled to the one-half of these shares. This I am inclined to regard as not coming within the rule of being directly responsive to the allegations of the bill. It sets out a new contract, and should be proved. The testimony of the witnesses is not positive and conclusive. They do not testify as to the terms used by the parties in making the contract.

C. D. Millerd says, in general terms, that it was agreed that the interests should be purchased for the benefit of both, as he *understood* it—giving the understanding of the witness, and not the words used by the parties.

Millard v. Ramsdell, and Ramsdell v. Millard.

The testimony of B. King, as to the purchase, is still less explicit.

It seems strange that a transaction of this importance should have taken place without a written contract, or, at least, a verbal one more clear and explicit. It has rather the appearance of a conversation in relation to a contract, than a clear, definite and complete agreement.

No entry on the subject is made on the books. The money is paid entirely by Matthews; no charge is made to Millard or to the firm; and the title is taken to Matthews individually.

The claim, as alleged, is for an interest in the entire shares purchased of the heirs of Bond. The testimony relates only to the shares of the heirs residing in Massachusetts, while several others were resident in the immediate vicinity of Dexter. It will be perceived that *the contract is not proved in §92 that clear, full and precise manner which has uniformly been required as the first step toward the establishment of a parol contract for the conveyance of lands.

If the contract be vague and uncertain, or the evidence to establish it insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy. (*Cobson v. Thompson, 2 Wheat. R., 336.*) It was, however, insisted that there had been such unequivocal acts of part performance as would confirm the existence of the contract, and take it out of the operation of the statute.

These acts consist principally in certain improvements upon the property after the death of Bond, by the surviving partners, and without keeping an account of their expenditures. The rule is that the act of part performance must unequivocally result from the agreement alleged. (See *Burtch v. Hogge, ante, 31; Bomier v. Caldwell, ante, 67; McMurtrie v. Bennett, ante, 124.*) It may have been so in this case; but this is not one of those cases where the acts must necessarily have resulted from this agreement, and are inconsistent with any other.

It will be perceived that, from the view I have taken of this

Millerd v. Ramsdell, and Ramsdell v. Millerd.

portion of the cause, this is not a case of parol contract clearly proved and partly performed, which calls upon this court to decree a specific performance. It is not clearly and distinctly proved. It is positively denied by Matthews. The money was all paid by him, and no charge made, either to Millerd or to the firm. The title deeds were all taken in his name, and it at least presents such a case of doubt as admonishes this court of the danger of interfering to decree the performance of a contract which may never have had an existence.

Matthews, although he denies any new agreement, says he believed at the time he was bound to continue the partnership. It is not going too far, I think, to regard this to have been the understanding of the parties, as the interests were subsequently vested in Matthews, to accord to them an equal interest in the profits after the death of Bond.

Hence, it will result that, in taking the accounts, Millerd must be regarded as having fulfilled on his part the original agreement, and to be entitled to one-third of the real estate, and to one-third of the profits of the co-partnership to the death of Bond,

393 and that the accounts *be stated to that period. That thereafter the survivors, Millerd and Matthews, share and share alike in the profits. That the legal representatives of Bond be credited with interest upon their share of the capital, and a reasonable rent for their proportion of the real estate, from that period, to be ascertained by the master. And as it appears that the repairs and improvements made to the real estate were necessary and useful, and were made with the concurrence of Matthews, in whose estate these shares are now vested, that the representatives of Bond are to be charged in the account with one-third of their cost, and that further directions be reserved until the coming in of the report.

July 11, 1840, a rehearing was granted upon petition filed for that purpose, and an order granted staying all proceedings until the rehearing should be had. The following is the opinion of the chancellor upon the rehearing:

Millerd v. Ramadell, and Ramadell v. Millerd.

THE CHANCELLOR.—Most of the questions raised upon the rehearing of this cause were considered and disposed of when the case was before the court upon the first hearing. It is not necessary, therefore, to again go through the details of this complicated case. Upon a review, I must confess I have had more hesitation and doubt upon the question as to whether Matthews ought not to be held and considered as having purchased the interest of the deceased partner for the benefit of the firm, and an equal division made, both of the property and profits, after the repayment of the money paid by him for the purchase of this interest.

But as there is no reasonable doubt from the entire case that the purchase money was paid by Matthews, no charge or memorandum made on that account in the books, and no written contract or memorandum between the parties, it is, perhaps, if there be an error, erring on the side of safety to adhere to the views then expressed upon this point, although it is with some doubt and hesitation. But the point made upon the rehearing, and to which the petitioners must be confined, is that the representatives of the heirs of Bond are entitled to their election, to take either interest or profits upon that share. It was held upon the former occasion, as well from the pleadings and proofs as from the whole course of the business of this firm, that it was understood and agreed, on the part of Matthews, that this partnership *should be continued, and that each party was entitled 394 to share alike after the death of Bond.

The interest of Bond being vested in Matthews, to give him or his representatives this option now, would be contrary to what, from the entire case, must be inferred was the contract and understanding of these partners, inequitable and unjust.

Of the general rule that the representatives of a deceased partner have this election, when the partnership is continued without their assent, there is no doubt.

But here this interest is vested in one of the partners who has consented to the continuance of this co-partnership; the reason

Millerd v. Ramsdell, and Ramsdell v. Millerd.

of the rule ceases, and he cannot be permitted to share in a manner different from and in violation of the manifest understanding of the parties.

Although not embraced in the petition for a rehearing, it is urged that rent, instead of interest, should be charged upon the share in the mills and real estate originally belonging to Bond. Such was my first impression.

The whole matter of the negotiation after the death of Bond is left very obscure; no terms or conditions satisfactorily established in the pleadings or proofs. The master, in fixing upon a reasonable rent, must, in fact, resort to the profits made by the mills, which formed the principal business of this copartnership, and it will, in fact, by changing the decree in this respect, be but allowing profits by another name, which the case made will neither call for nor justify.

There is much that is obscure in this case, but, upon the whole, I think that the equity of the case does not call for or justify the relief sought for by the petition for a rehearing.

Motion denied, and the order for a stay of proceedings vacated.

Schwarz v. Wendell.

John E. Schwarz and others v. Tunis S. Wendell.

Plea, requisites of: Answer in support of. A plea of a stated account must aver the accounts settled all the dealings between the parties; that the accounts were *just and fair*, and due; and these averments must be supported by an answer to the same effect.

A plea of a release, unsupported by an answer, is insufficient.

The bill of complaint alleges that on the 6th of March, 1836, Tunis S. Wendell, who was then acting as trustee of the complainant, Catharine Schwarz, inquired of said Catharine whether it was not probable that the interests which the co-heirs of Abraham Sheridan held in common with said Catharine in 17 inlots, and 4 outlots, in the borough of Erie, Pennsylvania, could be purchased; adding at the same time that he had received an offer for the whole property. After some conversation between the said Wendell and the complainant John E. Schwarz, husband of said Catharine, it was proposed by Wendell and assented to by said John E. Schwarz without consulting Catharine Schwarz, the *cestui que trust*, that he, Wendell, should raise sufficient money to buy the interest in said lots, not held and owned by said Catharine, and for that purpose, he, said Wendell, should visit the city of Philadelphia, where the persons owning the property resided, and endeavor to purchase the same; and for his trouble should receive one-half of the profits arising from the purchase of said lots. That on the day following this interview, the said John E. and Catharine came to the city of Detroit at the solicitation of Wendell, and the said Wendell then required said Catharine to execute a note of that date for \$4,000, payable in 90 days to him or his order at the Bank of Michigan, to enable him to raise the necessary means to purchase the property. Against this proposition John E. Schwarz protested, and said it was a variation from his (Wendell's) proposition of the day before, to furnish the

Schwarz v. Wendell.

money, and that to require the said Catharine to furnish the money, and give him, the said Wendell, a share in the expected profits, would be unjust; to which Wendell replied, that he had made his calculations and preparations to commence his journey, and if they declined sending him, \$2,000 would not indemnify

him against the damage he would thereby suffer. The
396 said *Catharine then, without understanding the proposition or terms upon which Wendell proposed to buy said property, and being urged by her husband, John E. Schwarz, and the said Wendell, and acting on their advice, executed the said note and delivered it to Wendell.

Immediately after the said Wendell drew up a memorandum of agreement, set forth in the bill of complaint, between himself and the said John E. Schwarz, on the part of said Catharine, reciting that, as he had procured on that day \$4,000 from the Bank of Michigan for the purpose of purchasing the interests of Richard P. Harding and John G. Thomas in the 17 inlots and 4 outlots, in the borough of Erie, Pennsylvania; that he, said Wendell, should immediately proceed to Philadelphia for the purpose of purchasing the said property; and that he should have one-half of all the profits arising from the purchase of said property, or if he succeeded in only purchasing part of the property, he was to have one-half the profits on the portion acquired, and his expenses. And it was further provided in said agreement that if he did not succeed in making the purchase, said Catharine should pay his traveling expenses merely, and it was also agreed that if he purchased any other property it should be for the benefit of the said Catharine. The bill alleges this memorandum was signed by the said Wendell and John E. Schwarz without the knowledge, direction or consent of the said Catharine. On the 8th March, Wendell started, having previously obtained the amount of the note made by said Catharine of the Bank of Michigan. On the 19th March he purchased of John G. Thomas and wife their interest in said lots, being one undivided third part, for \$1,200, and took the title in his name as trustee of the said Catharine. Wendell then

Schwarz v. Wendell.

made other purchases of real estate for said Catharine to the amount of about \$1,600, and paid therefor out of the money derived from said note of \$4,000. Complainants cannot state the amount precisely of all the purchases, as no account of said \$4,000 has been rendered, and all the deeds not being in the possession of the complainants.

The bill further states that no part of said \$4,000 note has ever been repaid to the complainants, but alleges that a large sum remains unexpended for the use of the said Catharine, and unaccounted for by said Wendell. The \$4,000 note became due on the 10th of June, 1836, and on request of Wendell that some other person should be *procured as an indorser on 397 the note which was to be made to renew the one falling due, the said Catharine procured Euros P. Hastings to indorse the same. This renewed note, when it became due at the bank on the 31st of August, 1836, was paid by said Wendell out of money belonging to said Catharine.

The bill further states that Wendell, on or about September 3d, 1836, mentioned that he had a chance to sell his share of the Erie property to one Abijah Fross, who complainants believe was a man of little or no credit or responsibility, for the sum of \$5,000, but offered to sell it to said Catharine, and take a certain mortgage which she held against one Joshua Boyer, and to receive the balance in a note of hand on long time, to which said complainant John E. said he would consent if Catharine was willing to agree thereto. In a few days after an assignment of the mortgage and a note for the balance of the \$5,000 was prepared, which the said Catharine declined signing, saying that the said Wendell must wait for his share of the profits until the property was sold.

The bill of complaint further states, that afterwards, and on or about the commencement of 1837, John E. and Catharine Schwarz on the one part, and Wendell on the other, became dissatisfied with each other, and it was agreed between them that the said Wendell should transfer all the trust property in his possession to

Schwarz v. Wendell.

the complainant, Eurotas P. Hastings, appointed by said Catharine as her trustee to hold the same; and papers, deeds and conveyances were prepared, and on the 28th January, 1837, said John E. and Catharine and Eurotas P. met said Wendell to have him execute the said deeds; that on the same day after the deeds were laid on the table, but before their execution, said Wendell presented and required said Catharine to sign as an implied condition of his transferring said trust property, a note bearing date that day for \$3,980.24, payable in three years from date to said Wendell or bearer; that said demand was a surprise upon complainants; the said Wendell also at the same time produced a memorandum not intelligible to them, wherein he charged said Catharine \$5,000 for his share of the Erie property, and after deducting certain items presented the said balance of \$3,980.24.

The said Catharine insisted that the demand of said Wendell was unjust; but he insisting upon it, she for the purpose
398 of avoiding any *difficulty, and to get the property out of his hands, after hastily consulting with John E. Schwarz, signed said note. Wendell, before signing the deeds, requested said Hastings as trustee of said Catharine to sign said note, and he, without any knowledge of the facts and circumstances, and at the request of said Catharine, signed it. The note was delivered to defendant, and the conveyances executed and delivered. And the bill prays for an accounting, and that the note be delivered up to be canceled.

To the bill the defendant filed a plea.

The plea states that at the time when the defendant assigned the trust estate to Hastings, as is stated in the bill, he rendered to the said Catharine and Hastings an account of all money and property received by him as trustee, and an account was then taken between the parties of all money received and paid out by defendant as such trustee, and all his transactions as such trustee, and on such accounting there was found due from said Catharine to said defendant \$4,160.63, and that balance was stated, agreed upon and acquiesced in, by the said Catharine, Eurotas P. and

Schwarz v. Wendell.

John E., and thereupon defendant took a note from and executed by the said John E. for \$180.59, and he then took from said Catharine and Eurotas P. as trustee, another note executed by them for \$3,980.24, payable to defendant or bearer, three years after date, with interest at six per cent per annum, and dated the same day, January 28, 1837, the said two notes amounting together to the said sum of \$4,160.83, the former of which notes is in possession of defendant, but the latter has been sold and transferred by him.

The plea avers the settlement of all things relative to the trust, and the execution of an indenture by the said John E. and Catharine, and the said Eurotas P. as her trustee, and the said defendant, of the same date with said notes, wherein after reciting his having formerly acted as trustee, his having executed deeds, entered into covenants, and done other acts at the request of said Catharine and John E. which might create a personal liability on his part, and his having assigned the trust, the said John E. for himself, his heirs, etc., in consideration of the premises and of the sum of one dollar paid, covenanted and agreed to save harmless and indemnified, and keep defended the said defendant of, and from all acts, deeds and covenants, by him as such trustee done or executed, and from all liabilities existing *or which 399 might arise by reason of his having acted as such trustee, and to reimburse him for all losses he might be compelled to sustain by reason thereof. And the said Eurotas P., for the like consideration, covenanted and agreed in like manner as the said John E., so far as the funds and property belonging to the said Catharine, and in his hands, as trustee, would enable him, and to that extent and no more.

Joy & Porter, for complainants.

The plea is insufficient, for two reasons.

1. It is not averred in the plea that the account which was stated was a true and just account, to the best of the defendant's knowledge and belief. This is necessary, although the bill does

 Schwarz v. Wendell.

not impeach the account on the ground of fraud or error. (3 *Johns. Ch.*, 388-391; *Beames Pl.*, 230; 3 *Atk. R.*, 70; *Coop. Pl.*, 279; *Mif. Pl.*, 260; 4 *Paige*, 195.)

2. The plea does not put in issue the matters charged in the bill. It does not deny the constructive fraud alleged, nor the imposition. The plea should deny the fraud charged, or the facts which constitute the fraud. (4 *Johns. Ch.*, 696; 3 *Paige*, 277, 278; 2 *Atk. R.*, 119.)

D. Goodwin, in support of the plea.

The plea sets forth an accounting, settlement, notes for balance, and an agreement by the complainants to indemnify the defendant against all his doings as trustee, and all losses and liabilities arising therefrom.

1. To a bill for an account, an account stated and a settlement constitute a good plea in bar, and such account can be opened only in case of a palpable mistake or fraud. So a release is a good bar to such or any bill, and can only be set aside for fraud.

2. Here not only a settlement and a note for the balance due and agreed upon on accounting are shown, but also an agreement by *these very complainants* to indemnify the defendant in respect to the matters complained of. This is stronger than a release. If complainants succeed, defendant has directly an action against them co-extensive with their recovery. This a court of chancery will never tolerate; on the contrary, if complainants could, for the cause alleged, proceed and recover at law, a court of

400 chancery would upon this *agreement enjoin them from so doing and prevent the cross actions. On the covenant Schwarz and Hastings are personally liable, as Wendell was on the note he gave to the bank. (2 *Wheat R.*, 45; 2 *Am. Com. Law*, 193; 8 *Cow. R.*, 31; 9 *Johns. R.*, 334; 7 *Cow. R.*, 453.)

3. Upon the bill there is not enough shown to entitle complainants to relief. The settlement was long after the transactions out of which the complaint arises, and surely parties, *cestuis que trust* as well as others, may settle their own affairs, and here it is done.

(1 *Bald. C. C. R.*, 418.) A *cestui que trust*, whether *feme covert* or otherwise, is in equity owner of the estate, and may devise, alien and encumber for debts. A married woman may even mortgage the estate held in trust for her husband's debts. (1 *Madd. R.*, 453; 2 *Kent*, 162.)

4. The agreement to indemnify (which is tantamount to a release and more) is not mentioned in the bill. It must have full and complete effect. It forms a perfect bar, and could only be set aside for fraud, clearly and conclusively shown, and upon allegations and averments in a bill framed with that view.

THE CHANCELLOR.—The plea in this case is insufficient. It merely sets up the settlement, release and covenants, and that the note was given for the balance found due to him. It does not state the manner in which the account was rendered.

It is alleged in the bill that the claim for which the note in question was given arose from the profits of the speculation upon the Erie lots therein mentioned; that the profits, if any, arose from the use of the funds of the *cestui que trust*, and that the amount was presented on a slip of paper, and unintelligible, and that the present trustee, Mr. Hastings, executed the covenant without any knowledge of the facts.

The rule is very well stated by Lord Reddesdale in the case of *Roche v. Morgell*, 2 *Sch. & Lef.*, 726. He says:

"Upon the argument of a plea every fact stated in the bill and not denied by the answer in support of the plea, must be taken as true. The plea to the relief (of a stated account) ought to have averred that the accounts settled all dealings between the parties, that the accounts were *just* and *fair* and due; and these averments *ought to have been supported by an answer 401 to the same effect."

The same rule is also substantially stated by the same high authority on the subject of pleading in *Mit. Pl.*, 262, etc. There are many other authorities sustaining this rule.

Without going into the consideration of the other point raised

Schwarz v. Wendell.

at the hearing as to the relation of the parties as trustee and *cestui que trust* at this time (which would now perhaps be admitted), I must say that this seems to me a very proper case for the application of the rule. The covenant entered into by Mr. Hastings, the new trustee, and the other complainants, under the circumstances alleged in the bill, cannot vary the rule.

The plea must be overruled.

A rehearing of this cause on the plea filed was granted.

Joy & Porter, for complainants.

D. Goodwin, for defendants.

THE CHANCELLOR.—A plea is a special answer to a bill demanding the judgment of the court in the first instance, whether the special matter urged by it does not debar the complainant from his title to an answer which the bill requires.

The rule as to pleas which was stated on a former occasion is admitted to be the correct one; the propriety of its application to the case under consideration is, however, questioned.

It is not necessary to reiterate at much length the allegations of this bill, as they were before fully stated. The allegation that this claim of five thousand dollars in substance and fact arose from the use of the trust funds, used in a supposed speculation in lands at Erie, is not denied. It is further alleged that this demand was unexpectedly made when the parties had met together to execute the deeds. That it was a surprise upon the *cestui que trust*, that the defendant insisted that the *cestui que trust* should purchase this interest, that he insisted upon its present settlement, that it was yielded to hastily and for the purpose of getting the property out of the hands of the defendant, that the new trustee signed the note without any knowledge of the facts and circumstances stated in the bill.

It is further charged that no part of the \$4,000 received by the trustee has been repaid to the complainants or any of

402 them, and that *they fully believe that a large balance of

Schwarz v. Wendell.

said money still remains in the hands of said defendant, and unaccounted for by him, and that the account was presented on a slip of paper and unintelligible. The bill also prays an account of this money, as well as to be relieved against the note, and for such further and other relief as the circumstances of the case may require. Now, whether these allegations relate to one transaction, or to one or more items of a complicated account, can make no difference; and without reference to the covenants set up by way of defense in the plea, the plea unsupported by an answer cannot bar the complainants from an answer to which they are entitled, and the rules of pleading as before stated are correct, and applicable to this case.

But it is insisted that the covenants, not being alluded to in the bill, constitute a bar to the relief. The indenture containing these covenants bears even date with the alleged settlement and note. It is as follows, as stated in the plea (after the preliminary recital), that "this defendant had executed various deeds, entered into several covenants, and done other matters, at the request of the parties of the first part (the said Catharine and the said John E.), some or all of which might then create a personal liability on the part of the defendant, and that this defendant had by deeds of equal date therewith assigned over to the said Eurotus P., his heirs and assigns, at the request and by the desire and appointment of the said Catharine, all the said trusts and all the trust property belonging to the said Catharine heretofore vested in him; and that the said John E. in and by the said indenture, in consideration of the premises and of the sum of one dollar therein acknowledged to have been received from this defendant, did for himself, his heirs, executors and administrators, covenant, promise and agree to and with this defendant, his heirs, executors and administrators, that he, the said John E., should and would well and truly save harmless and indemnified, and keep defended this defendant and his legal representatives of and from all acts, deeds, covenants and other doings which he, this defendant, at any time theretofore had done, committed, executed or entered into as

Schwarz v. Wendell.

trustee as aforesaid, or in the execution of the said trusts, and of and from all consequences and liabilities of every kind or nature then existing, or which might thereafter arise,

408 *for or by reason of his (this defendant's) having acted as such trustee, and should and would reimburse this defendant and his said representatives all such losses or sums of money, if any, as he or they might be legally compelled to pay or sustain for or by reason of his (this defendant's) having accepted the said trusts."

It was held*in the case of *Roche v. Morgell*, 2 Sch. & Lef., 721, that a plea of a release unsupported by an answer was insufficient, although the same objection was there urged which is now taken, that the bill did not refer to it, and pray that it might be set aside.

Certainly no greater effect can be given to this statement than to an express release. On the contrary, I have strong doubts whether the covenants set out in this plea were intended to extend to, or do in fact reach the case made by the bill at all.

The manifest intent and object of this instrument was to indemnify and save harmless the trustee from any act done by him in the execution of his trust. The prayer of the bill, among other things, is that he may account for money belonging to the trust fund, which they charge to be in his hands unaccounted for.

It would in my view be going very far to say that these covenants shall bar and preclude the complainants from an answer, when in fact they were intended for another and a different purpose. But I do not intend to dwell upon this view of the case, as it is not now intended to preclude the defendant from whatever benefit he can properly derive from this defense when supported by an answer.

Enough has been shown, I think, to justify the conclusion that the plea is insufficient. To obviate any embarrassment which may be apprehended from the form of the entry, the order will be that the plea stand for an answer with liberty to accept. (a.)

(a.) This case came on for final hearing on pleadings and proofs before Chancellor Manning, and is reported in Walker's Chancery Reports, 267. The settlement relied upon in this plea was there set aside, and an accounting ordered.

Sinclair v. Comstock.

Daniel D. Sinclair v. Addison J. Comstock and others.

Town plat: Dedication. Where the proprietors of a village plat have made a plan by which they have dedicated land for streets, or for a public square, and have sold lots in reference to such plan, they cannot afterwards resume and exercise acts of ownership over the land thus dedicated, which will deprive their grantees of any privileges or advantages which they might derive from having the streets or square kept open. (a.)

But in every such case the intention to appropriate the land for the purpose claimed must be clearly apparent. (b.)

Dedication: Refusal to accept. Where a lot was marked on a town plan as "Court House Square," the purpose being to donate it to the county for the erection of a court house and jail thereon, and the county erected these buildings on another lot, it was *held*, that this constituted sufficient evidence of the refusal of the county to accept the donation, and the proprietors were at liberty to appropriate it to other purposes.

After such refusal, the purchasers of other lots on the plat have no right to insist that such lot shall be kept open as public grounds.

Motion to dissolve injunction on bill and answer.

The bill of complaint alleges that the plan or plat of the village of Adrian was laid out in 1827-8 by Addison J. Comstock, one of the defendants, who was the owner of the lands constituting the same; that the plat of said village was duly recorded in the register's office as required by the statute; that on the plat lot number 14 was given by the proprietor to the county of Lenawee, for a court house and jail; that at the time the village of Adrian was laid out the county seat of said county was at Tecumseh; and it was the intention of the proprietor that lot 14 should be used as well for a public square as for a court house or jail; that it had been so used from the time said village was laid out, with the knowledge and assent of the defendant.

(a.) See *Smith v. Lock*, 18 Mich., 56.

(b.) See *People v. Jones*, 6 Mich., 176; *People v. Beaubien*, 2 Doug. Mich., 256; *Cook v. Village of Hillsdale*, 7 Mich., 115; *Lee v. Lake*, 14 Mich., 12; *Tillman v. People*, 12 Mich., 401; *Baker v. Johnston*, 21 Mich., 319.

Sinclair v. Comstock.

The bill states that the defendant sold lot 49, adjoining lot 14, and described the same as bounded on the north by the public square; that lot 49 had been subdivided and sold, and the purchasers had erected on the same valuable buildings fronting on the *public square* as described in the deed of lot 49, with the full belief that lot 14 would always remain a public square for the common benefit of the inhabitants of said village. The bill alleges the defendant had full knowledge of the expectation of those who erected the buildings fronting lot 14, and made no objection thereto.

The bill also alleges that the defendants, with others, made additions to said village plat, and procured to be published a map of the said *village, upon which lot number 14 was designated as a *public square*, and another lot was designated as the site of the court house and jail, and called Court House Square.

That the complainant, believing lot 14 would always remain open, purchased one of the subdivisions of lot 49, fronting on the public square, or lot 14.

By an act of the legislature approved 21st March, 1836, it was declared the county seat should be established at Adrian, from and after the first Monday of November, 1838. On the 6th of June, 1837, defendant Comstock deeded to the supervisors of the county of Lenawee a piece of land at or near the village, for a court house and jail. On the 5th of June, 1837, defendant Comstock deeded lot 14 to George Crane, his heirs and assigns, in fee simple, without consideration. Immediately after this conveyance Crane caused public notice to be given that he would sell at public auction lot 14, the same having been subdivided into ten lots. The complainant, and others also, who had purchased parts of lot 49, as subdivided, caused public notice to be given before and at the time of the selling of the subdivisions of lot 14, that Crane had no right to sell and convey the same, as it was reserved for a public square, and private buildings could not be erected thereon, and that his right to the same would be litigated. Lot 14 as sub-

Sinclair v. Comstock.

divided was sold, however, and the defendants became the purchasers. The bill charges that the defendants are about to erect buildings on lot 14, as subdivided, by which the complainant will be greatly injured, etc. And it prays injunction to prevent such erections. A preliminary injunction was granted.

The answer admits the village of Adrian was laid out as stated, and that lot 14 is on the plat reserved to the county of Lenawee for a court house and jail. At the time of the laying out of the village of Adrian the county seat was at Tecumseh, and it was understood and *declared* that lot 14 was only to be used by the county for a court house and jail, and for no other purpose whatever; and the statement was repeatedly made to the citizens of Adrian, and the defendant expected if the same was not used for the purposes for which it was reserved, it would revert to him. The answer admits that on the first of March, 1828, defendant Comstock acknowledged the plat of the village of Adrian, and under his hand and seal granted the streets and lot 14 for the purposes named and expressed on the map of the plat

*of said village, which was duly recorded. Lot 14 has 406 been open from that time until the present, with the knowledge of the defendant, but without any express assent; admits there was a bond or agreement as set forth in the bill to sell lot 49, in which it was described as bounded on the north by the public square, and on December 28, 1835, in accordance with the provisions of the bond, a deed was made bounding it in the same manner. The subdivision of lot 49 is admitted, and the sales to the complainants and others, and the erection of buildings; but it is denied that the complainant had any assurance that lot 14 would remain open, nor had he any reason to believe the defendants would ever assent to it remaining open and unoccupied, for Comstock had asserted and given notice before and at the time of the sale of lot 49, and before and at the time of the erection of the buildings thereon, that he should claim lot 14 if the county did not use it for the purpose specified in the grant to the county. The answer admits the making of an addition to the

Sinclair v. Comstock.

village, the publishing a map, as alleged in the bill upon which lot 14 is designated as a public square, and another lot is called "Court House Square," but denies that Comstock, the defendant, ever assented to the map being made, and avers that it does not correspond with the original on record; admits the change of the county seat from Tecumseh to Adrian in November, 1838; admits that defendant Comstock did convey to the county of Lenawee a lot for a court house and jail in June, 1837; admits that defendant Comstock, on June 5, 1837, conveyed lot 14 to Crane; says that by act of the legislature the board of supervisors had the authority to fix the county seat or court house on such lot as might be conveyed to them, and that they did so fix the same on a lot between Front and Toledo streets, and the defendant conveyed the same to the supervisors on the 7th of March, 1837, and that it was understood by the board of supervisors, as well as defendant Comstock, that lot 14 reverted to defendant Comstock; but he agreed at that time to give lot 14 or the avails thereof to the board of supervisors for the purpose of erecting the county buildings; and George Crane was agreed upon as commissioner to receive the title and sell and dispose of the same for the benefit of the county. The deed was made to Crane on the day mentioned in the bill, and Crane gave back an instrument declaring he held the same in trust for the county, to be

407 disposed of, and the avails used in erecting county buildings; admits that Crane gave no other consideration than as above mentioned, and that he sold the same as trustee for the county duly appointed, at public auction, as alleged in the bill; admits the complainant gave notice that lot 14 was a public square, etc., as mentioned in bill of complaint; admits defendants are about to erect buildings on lot 14, as subdivided, but denies that it will materially obstruct the view of the complainant from lot 49, as there is a street 30 feet in width running on the line of lot 14, and between that and lot 49. The defendants pray to have the same advantage as though they had demurred to bill of complainant, etc.

Sinclair v. Comstock.

A. Felch, in support of the motion.

The original grant of the lot in question (No. 14 in the village of Adrian) was a conditional one, being given for a court house and jail.

Whether a condition be *precedent* or *subsequent* will depend on the intention of the parties creating the estate. (*Finlay v. King*, 3 *Pet. R.*, 346.)

The county seat could not be changed without an act of the legislature, nor could the lot in question be used for the purpose designated without such an act. The intention of the parties must have been, therefore, to set apart this lot for the purpose of putting upon it a court house and jail, if the legislature should pass such an act. The building of a court house and jail, or at least an acceptance of the grant for that purpose, was necessary before the grant took effect, and, until that was done, both the fee and the possession remained in Comstock.

In the case of the *First Parish in Sutton v. Cole*, 3 *Pick.*, 232, land given for the use of schools, it was decided, could not be recovered by the donors until they had accepted the grant or made an entry under it.

In *Hayden v. Inh. of Stoughton*, 5 *Pick. R.*, 523, there was an acceptance of the grant by vote of the defendants.

The act of the legislature passed in 1836, establishing the seat of justice at Adrian from and after November 1, 1838, gave to the supervisors *the right to put the county 408 buildings on this lot, or such other lands as might be given for that purpose, in the village of Adrian. They were subsequently placed by them on another lot, which was deeded for that purpose by said Comstock, March 7, 1837. The object for which the lot in question was given was, therefore, never accomplished; the lot was never accepted nor used for a court house and jail; on the contrary, the act of the board of supervisors was an express rejection of the lot, and an acceptance of another from the same donor.

Sinclair v. Comstock.

A condition precedent must take place before the estate can vest or be enlarged, and, until the condition be performed the estate cannot be claimed to vest. (*2 Black. Com.*, 154.)

The condition must be literally performed, and even a court of chancery will not vest an estate when, by reason of a condition precedent, it will not vest in law. (*Popham v. Bampffield*, 1 *Vern.*, 33; 4 *Kent*, 125; *Vanhorne v. Dorrance*, 2 *Dall. R.*, 317; *Shep. Touch.*, 450.)

2. If it be conceded that the grant took effect immediately on recording the map of the village, the occupation of the lot for a court house and jail was a condition subsequent, and the location of the county buildings on another lot was a relinquishment of all right under the grants, and the premises reverted to the donor.

On condition broken the whole property reverts. (*Shep. Touch.*, 120; *Gray v. Blanchard*, 8 *Pick. R.*, 284.)

Lands given on condition that the public buildings of the parish be erected thereon revert to the donor if the seat of justice of the parish be removed by an act of the legislature. (4 *Kent*, 126.)

So a neglect to comply with the condition to build a school house for twenty years operates as a forfeiture of a grant. (*Hayden v. Inh. of Stoughton*, 5 *Pick. R.*, 228; *Lessee of Sperry v. Pond, etc.*, 5 *Ohio R.*, 387; *Heirs of Sullivant v. Commissioners of Franklin Co.*, 3 *Ohio R.*, 89.)

This, too, is the express provision of the statute of the State under which the grant was made. (*Statutes 1833*, p. 135.)

409 3. Deeding premises *described as bounded on the north by the public square gave no right as to lot No. 14. It was a mere description of the lot conveyed. The sale was made of a village lot by its number, and in reference to the village plat on record. The record showed the true character of the grant of lot No. 14, and the term "public square" could have been understood only as applying to lot No. 14, as there given, and not otherwise. The record showed that the only inter-

Sinclair v. Comstock.

est which the public could have in it was to occupy it for a court house and jail.

But the record is notice to the world of the character of the grant. (*Price et al. v. Methodist Church*, 4 Ohio R., 515.)

The term way or highway has in law a fixed definite signification, always implying certain legal rights. Not so with the term public square. It has no fixed legal meaning. It implies no covenant, and works no estoppel. It is like any other term descriptive of limits, and is to be taken in its general acceptance. This by no means implies that it should be what the complainants claim—an open, uninclosed space. And in this case the answer shows that at the time of the conveyance of lot 49, and subsequently, it was understood and declared to mean that the lot was intended for public use for a court house and jail, and not for a street or common.

Besides, the lot conveyed neither had nor required these premises to give access to it. It had its front on main street, and has been subdivided since the purchase was made of Comstock.

4. If the lot did not revert to Comstock, but the fee is still in the county under the grant, the complainant is in no better position, and must fail in the suit. By the grant of a lot for a court house and jail, no right is given to the owners of adjoining lots to require it to be kept unfenced, or without buildings, or open as a street or highway. Indeed, this would defeat the very object of the grant.

In the case of the Cambridge Common, it was decided that inclosing it with a fence, excluding travel by horses, carriages, teams, planting trees, etc., was not inconsistent with the grant; but, the land being appropriated to a specific public use, a highway over it would be inconsistent with the grant. (16 Pick. R., 87.)

Under the grant for a court house and jail there is a full right not only to inclose the premises and to erect thereon a court house and *jail, but barns, stables and all necessary outbuildings for the use of the jailer and others

Sinclair v. Comstock.

necessarily having charge of the public buildings. (*Jackson v. Pike*, 9 Cow. R., 69.)

And an occupying of the premises in the ordinary mode of occupying village lots is not inconsistent with the grant. (*Ib.*)

5. So far as even the imaginary rights of the complainant can go, the lots on the south side of the premises in question are abundantly provided for, in the location gratuitously by the defendants of a street thirty feet wide adjoining lot No. 49.

6. Here was no *dedication* of the land to the public for the purposes claimed in the bill. Such dedication supposes an act to be done by the owner in fee; this act must be unequivocal, and evidence an intention to grant the land for the purposes claimed; where the original owner continues to exercise any acts of ownership over the premises, or denies the right of the public to it, or claims rights in himself inconsistent with such dedication, it prevents a dedication. Even a disability to exercise acts of ownership over it will prevent it. (5 Taunt., 137; 10 Serg. & R., 412; *Wood v. Veal*, 5 Barn. & Ald., 454; *Harper v. Charlesworth*, 4 Barn. & Cres., 574; *Price et al. v. Methodist Church*, 4 Ohio R., 515.)

The facts disclosed by the bill and answer forbid the idea of a dedication of the lot in question, to be kept open without fence and without buildings. They show, on the contrary, that it was set apart for a purpose totally different, and every act of the donor in reference to the lot has been in accordance with the grant last mentioned. The answer shows that before the deeding of the lot owned by complainant, at the time of deeding it, and subsequently to that time, he denied the dedication of the lot for the purposes demanded in the bill, and claimed full and perfect right to the same, subject only to the interest acquired by the public for the uses designated in the plat of the village of Adrian.

Baker, Harris & Millerd, contra.

The estate conveyed to the county is not properly a trust estate. No trustee and *cestui que trust*. The title is absolute, except that

Sinclair v. Comstock.

they take on condition of devoting it only to a particular use; and equity would restrain from any other use. It conveys the fee *in presenti*, although the county seat was not then established at Adrian, *and there was no assurance that it 411 ever would be. Suppose it never had been, would the land have reverted, and, if so, when? And suppose it had been removed from Tecumseh to Palmyra, would the land have reverted? How does it appear but that the county seat may still at some time be established on this lot? (*Laws of Michigan, 1833, p. 531.*)

Comstock has dedicated the land to the public, and given reason to expect that it would always remain a public square.

1. By leaving it open and allowing it to be so used from the time of laying out the village.

2. By designating it the public square in solemn instruments.

3. By having maps lithographed and circulated, with this lot marked as a public square, and another as a court house square, after the county seat had been removed. Though the answer states that another person procured the maps, it does not deny a knowledge or participation on the part of Comstock, nor that he circulated them.

These are unequivocal acts which amount to a grant to the public, independent of the consequence on the original plat, and from which the individuals concerned were fully justified in concluding that it was always to be a public square.

The location of the court house and jail upon another lot, instead of this, having been made by Comstock's own consent and procurement, he cannot take advantage of it as a forfeiture.

Comstock, having conveyed to Hoag (under whom complainant claims), and described this lot as the "public square," and bounded the lot conveyed by the "public square," is estopped from denying that it is such.

The act to provide for the recording of town plats, etc., approved April 12, 1827, made it necessary for Comstock to make and record a plat, bounding and specifying all the streets and

Sinclair v. Comstock.

public grounds, and what the lands so described were intended for, and the acknowledgment and recording vested the fee of such land in the county; and the statute expressly recognized the title as in the county, by the provisions that such plat should not afterwards be altered, unless satisfactory proof was
412 adduced that *all persons owning any lot or part *thereof had agreed to such alteration*; by this means protecting acknowledged rights of persons, who had purchased with a view to the advantages of the public ground so set apart; and not subject to any condition, either subsequent or precedent.

The provisions in section four of the act to amend an act to provide for establishing seats of justice, on page 534 of Laws of Michigan (1833), do not apply to this case, as this conveyance from Comstock was made under another and entirely different law, relating to towns generally, and not to county seats, and under which the donor could have no grounds for claiming a reversion; and, further, if it did ever apply to cases like the one now under consideration, it can have no influence here, as it was in 1835 repealed, long prior to anything done herein.

THE CHANCELLOR.—There is no doubt that when the proprietors of a village or town have dedicated lots for streets or for a public square, and have sold lots with reference to such plan, they cannot resume and exercise rights of ownership over them, which will deprive their grantees of any privilege which they might derive from having such streets or squares left open.

But, in every such case, the dedication for the purpose claimed must be made clearly apparent. The lot in question was granted to the county of Lenawee for the purpose of a site for a court house and jail. The original dedication shows that such was the special purpose to which it was dedicated; and the answer of Comstock, the original proprietor, shows that it was granted for this and no other purpose; and states that it was always so declared by him.

The proper authorities of the county of Lenawee designated another and a different lot for this purpose, and have actually

Sinclair v. Comstock.

erected the court house and jail on another and different lot in the village of Adrian.

Comstock, the original proprietor, having transferred this lot originally dedicated for a court house and jail, the present complainant claims that it shall be kept open and uninclosed. Comstock, in granting the adjoining lot to the grantor of the complainant, describes the adjoining lot as bounded on the public square.

If this lot 14 had been left open as a common, and not designated upon the original plat as having been dedicated for that particular purpose, *I should have no doubt that 413 this would have been held as sufficient evidence that this lot had been dedicated for the general use of the inhabitants of the village of Adrian.

But when it appears by the public records that it was dedicated to a particular purpose, it would seem that this phraseology must have been used merely by way of description, and was not intended to and cannot change the character of the grant.

In order to sustain this injunction it is necessary to require that a lot granted for one purpose, and to be used in a particular way, shall in fact be devoted to another purpose, which requires it to be used in a different manner.

The complainant claims that it shall be kept open as a common, or public square. The record shows that the only interest the public had in it was to occupy it as the site for a court house and jail; and the record must be considered as notice to the world of the character of the grant. By a grant of a lot for a court house and jail, no right accrues to the owners of adjoining lots, that it shall be kept open and uninclosed. On the contrary, it is to be supposed that if occupied for these purposes it will almost necessarily be inclosed, and occupied by all such necessary outbuildings as may be appendant, such as a jail yard, the usual stable and necessary outbuildings for the use of the jailer and his family.

The act of the commissioners establishing these buildings elsewhere seems to me a sufficient evidence of the refusal of the

Sinclair v. Comstock.

county to accept this donation according to the condition of the grant, and that it must in fact revert to the donor.

Whether this shall be the effect or not, this complainant has no right to insist that it shall be kept open as a public square or common, when from the terms of the grant it is apparent that such was not the intention of the donor; but on the contrary, from the object of the grant, if accepted and used for the purpose intended, it must necessarily have been occupied and inclosed.

Injunction dissolved.

Payne v. Atterbury.

Rodney C. Payne v. Robert B. Atterbury.

Receiver, when one will be appointed. Where complainant by his bill shows a legal title to lands in possession of the defendant, and from the answer of defendant a strong presumption arises of title in complainant, the court will grant a receiver.

This is especially the case when there are large encumbrances on the lands, and no part of the rents and profits is applied to keep down the interest, and defendant is irresponsible, and is holding over against his own deed.

Answer: Impeaching deed. An answer which admits a deed set out in the bill does not sufficiently impeach it by denying its validity in general terms; it should state the facts which are supposed to render the deed invalid, so that the court may pass upon them.

At law a party is estopped from disputing his deed; and if he would impeach it in equity he must show in what his equity consists.

Vendee's lien. A vendee who has paid the purchase money, has a lien against the vendor analogous to that of a vendor against a vendee who has not paid the purchase money.

The bill in this case states that December 8, 1838, defendant became the purchaser of the N. E. qr. of section No. 14, town 7 S. range 17 W., containing 159 $\frac{3}{4}$ acres; also the N. W. fr. qr. of section 13, town 7 S. range 17 W., containing 136 $\frac{1}{4}$ acres. That soon after such purchase defendant mortgaged the same to George W. Walker, to secure the sum of \$2,500, which, according to the belief of complainant, was for the purchase money of said premises. That another mortgage was executed by defendant upon the same premises to John Hamilton, to secure the sum of \$1,000, which, according to the belief of complainant, was also for purchase money. That the defendant purchased said premises subject to a mortgage made by John Hamilton to Alfred Stanton for \$2,000, also subject to a mortgage made by Jacob Beeson to George Kimmel, upon which there was due at the time of the purchase about \$1,000. That defendant came to Michigan from New York in the spring of 1839, and commenced erecting a large flouring mill upon that part of the premises described as the

Payne v. Atterbury.

north-east quarter of section fourteen. That the defendant was possessed of little or no means for carrying on and completing the mill, but relied on his credit and the chance of procuring
415 *loans of money for that purpose. That August 14, 1839, defendant applied to complainant as cashier of the F. & M. Bank of Michigan, at St. Joseph, for a loan of money to be used in erecting said mill, and informed complainant that he had funds in the hands of Philip S. Crooke, of New York city, who would accept the drafts of defendant, and would certainly pay the same at maturity. That confiding in these statements complainant made a loan of \$2,000 to the defendant upon his draft drawn upon said Crooke, payable four months after sight. That August 24, 1839, said Crooke accepted the draft in writing thereon. That September 14, in the same year, defendant again applied to complainant for another loan of \$3,000 upon the same kind of security, and complainant having confidence in the integrity of defendant, which was strengthened by the ready acceptance of the first draft by said Crooke, which had not yet matured, complainant did loan and advance to defendant the further sum of \$3,000 to aid defendant in building said mill, and the defendant as security therefor drew his other bill of exchange dated at St. Joseph, September 14, 1836, directed to said Crooke, payable sixty days after sight, payable to the order of R. C. Payne, Esq., cashier, for the sum of \$3,000. That September 26, the same was accepted by said Crooke in writing.

The bill further states that prior to the drawing of the first mentioned bill or draft, defendant had borrowed \$200, and had drawn on said Crooke to pay the same; that said Crooke accepted said draft, and defendant made provisions for the payment of the same out of the money obtained on the \$2,000 draft, thereby inducing the complainant to believe he actually had money in the hands of Crooke in New York.

The bill further states that the complainant commenced suits in the circuit court for Berrien county in the spring of 1840, on the two drafts of \$2,000 and \$3,000, they having been protested for

Payne v. Atterbury.

non-payment; that the defendant, Atterbury, executed a deed of the premises to Crooke, bearing date March 1, 1839, for the consideration of \$7,800, subject to the mortgages aforesaid, which was recorded June 24, 1840. The bill further states that in the summer of 1840 an attachment suit was commenced against Crooke by the complainant *for the purpose of collecting 416 the amount due on the drafts, and the property in question was seized. That suit was finally settled by the complainant agreeing to take a deed of the premises, and paying for them \$2,191, being the amount of some lien upon the premises on which Crooke was liable, and surrendering the two drafts drawn by Atterbury, then amounting to \$5,299. On the 14th of October, 1840, this negotiation was consummated, and Crooke deeded complainant the lands described, with the mills and appurtenances.

The bill states that various offers were made to the defendant for the purpose of finally and amicably arranging the same, but he has refused to do anything towards paying the amount due, and will not yield up the premises to the complainant; that a suit of ejectment has been commenced against the defendant to obtain possession of the property, but in the meantime the property is depreciating in value from the neglect of the defendant, who is insolvent, and unable to respond in damages.

The bill further states that the interest on the several mortgages has not been paid up, but is suffered to accumulate by the defendant; that the mill is out of repair, and from neglect of defendant there is great danger of the dam being carried away, which will injure the property to the amount of \$1,500 to \$2,000; states that the defendant has made threats to destroy the mill, and said complainant should never have any benefit from it. The bill prays that a receiver may be appointed of the rents and profits of the mill and property during the pendency of the suit in ejectment.

The answer admits the purchase of the property, and that it is subject to the several mortgages mentioned; admits the obtaining

Payne v. Atterbury.

the money on the drafts on Crooke, and that he paid the \$200 draft out of the money obtained on the \$2,000 draft; admits the drafts were protested for non-payment, and that suits have been commenced against him. His answer denies the deed to Crooke was valid, as it wanted a proper acknowledgment as required by the statutes of this State, but admits it has been placed on record in Berrien county, where the lands are situated. The defendant says he always claimed the property, and when the attachment suit was commenced against Crooke, notified the complainant to that effect; neither admits nor denies the settlement

417 between complainant and Crooke, and the taking *of the deed from him, as set forth in the bill of complainant. Admits various propositions, and that they were not accepted; denies that the complainant has peaceably and quietly attempted to obtain possession of the mill, or that the mill is out of repair, or has been suffered to become in any way injured for want of repair, or that he is insolvent and unable to pay the amount due to the complainant; admits the interest on all the mortgages has not been paid; denies that he is abusing the mill or premises; avers they are in good condition; admits he may have used hasty expressions about the complainant's obtaining the property and deriving any benefit therefrom; admits complainant has requested him to deliver possession of the premises, which he refused, and that a suit in ejectment has been commenced; denies pretences, combination, etc.

Green & Dana, for complainant, moved for the appointment of a receiver in accordance with the prayer of the bill, upon the bill, answers and depositions showing the value, condition and situation of the property.

V. L. Bradford and *J. G. Atterbury* opposed the motion.

THE CHANCELLOR.—From the case presented the complainant has made out a *legal* title to the property in question. In the case of *Stillwell v. Williams*, 6 *Madd. R.*, 49, it is said, "that where

Payne v. Atterbury.

from the answer itself there is a strong presumption against the defendant's title which is impeached by the bill, the court will grant a receiver." The answer of the defendant in this case shows or raises a strong presumption of title in the complainant. It admits the deed to Crooke—the deed from Crooke to the complainant, and it states no facts which invalidate it. It denies generally its validity, but that is swearing to a conclusion which the defendant's own deed denies. He should state the facts which make the deed invalid, that the court may pass upon them, and not having done this, his deed must be held to bind him. The evidence in the case raises a strong presumption that the defendant, in attempting to evade the payment of his debts, was so far guilty of a fraud as that he could be estopped from setting up the facts upon which he relies, even as against Crooke himself. Indeed, from the testimony of Thomas Constantine and John S. Chipman, it is apparent that this must be so. And if this shall prove to be the contingency *referred to in the 418 answer, it would constitute no defense either in law or equity. He should have shown in what his equity consists, for as a question of law he is estopped from denying his own deed. A receiver will be appointed in behalf of a vendor as against a vendee who has obtained possession and refuses to pay the purchase money.

It is held in *15 Vesey, 344*, that a vendee who has paid the purchase money prematurely, has a lien as against the vendor analogous to that of a vendor in the opposite case. The defendant, as the case is presented, is holding over as against his own deed, and is not responsible for *mesne* profits or permissive waste. The amount of encumbrances, including the drafts paid by the complainant, amounts, with interest and costs, to about the sum of sixteen thousand dollars; this, from the testimony, must be the full value of the property or more. It also appears that the property could and should be made productive, and that it should yield sufficient to keep down the accruing interest on the encumbrances. But instead of that, that nothing whatever is paid on the out-

Payne v. Atterbury.

standing mortgages, some of which are in process of foreclosure, and which the complainant must extinguish in order to protect himself; that a property which should produce some \$2,500 per annum is actually not doing more than about one-tenth of the business of which it is capable.

The evidence in regard to the danger of the property is contradictory, but the *weight* of evidence is that the mill is badly managed, and the dam in a hazardous condition. The facts show bad management, a depreciation in the value of the property, and a total neglect of duty, or inability to perform it, on the part of the defendant. The case under all its circumstances is one pressing itself very strongly upon the discretion of the court. There is a large amount of interest constantly accruing on the outstanding encumbrances, all of which must fall on the complainant. This valuable property, which, under ordinary management, should produce sufficient to keep down the encumbrances, is actually paying nothing upon them, but the interest is suffered to accumulate, and the defendant is irresponsible. If this motion is refused the complainant is subjected to almost irreparable, inevitable injury, for which he has no redress. No rule is better settled than that

the complainant is entitled to the rents and profits from
419 *the time his title accrued. Lord Hardwicke in *Dormer v. Fortescue*, 3 *Atk. R.*, 128, observes: "Nothing can be clearer both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits from the time his title accrued." (*Green v. Biddle*, 8 *Wheat.*, 1.) The case is still stronger where there are large outstanding encumbrances, and no part of the rents and profits are applied to keeping down the interest, and the defendant totally irresponsible.

The answer of the defendant is in, testimony has been taken; from the answer and testimony it results that there is imminent danger that the complainant must lose the intermediate rents and profits unless the motion be granted; that the interest is permitted to accumulate on this large amount of encumbrances, and that the property is not made productive, and a portion is per-

Payne v. Atterbury.

mitted to go entirely to waste, and the weight of evidence is that it is in danger of destruction.

Under this state of facts the court cannot be satisfied that its duty is performed without the appointment of a receiver.

Order accordingly.

Hawley v. Sheldon.

Hawley v. Sheldon and others.

Specific performance: Want of mutuality. As a general rule a court of equity will not decree a specific performance where the remedy is not mutual, and one party only is bound by the agreement. (a.)

Jurisdiction obtained for one purpose retained for another. Though specific performance is refused on a bill filed for that purpose, the court, in a proper case, may retain the bill for the purpose of adjusting accounts between the parties. (b.)

Bill retained for the purposes of an accounting as to the value of improvements where the complainant had been in possession, and made improvements which defendants claimed were to be applied on rents.

The bill in this case was for the specific performance of a contract, and for the settlement of an account between the parties: and the prayer was that the balance found due complainant on the accounting might be applied on the contract. The facts, as appears by the bill, answers and proofs, are that defendant Sheldon, in May, 1834, proposed to the complainant to remove from Dearbornville, Wayne county, Michigan, to Kalamazoo, to keep the public house, and as an inducement, offered to sell one-half of the public house or tavern, and lands attached to it with the appurtenances, to the complainant, for \$4,000, or the whole at the same rate. The proposition was in writing, but no answer except a verbal one seems to have been given, though the complainant avers that he intended to have accepted and taken one-half of the premises, and did remove to Kalamazoo in 1835, and enter into possession of the whole premises. Considerable improvements had been made to the tavern-house and outbuildings by the complainant, and no rent had been demanded or paid, though he had been in possession some four years. The defendants were indebted

(a.) See *McMurtrie v. Bennette*, ante, 124.

(b.) See *Brown v. Gardner*, ante, 291; *Carroll v. Rice*, Wal. Ch., 373; *Whipple v. Farrar*, 3 Mich., 436; *Hawkins v. Clemont*, 16 Mich., 511.

Hawley v. Sheldon.

to complainant in a large sum on account of board, etc., which he insisted was to apply towards the purchase price of the property; and they insisted was to be canceled by the rent due from complainant. It does not appear that defendants Burdick and Lyon, who were joint owners with Sheldon, ever authorized him to make the proposition to sell, or even knew of it until about the time the bill was filed. There is no memorandum in writing except the proposition to sell from Sheldon, and he denies positively that it was accepted by the complainant, and claims that complainant has been in possession as tenant. The bill was filed in April, 1839, and it appeared the defendant Sheldon had sold his interest to other persons prior to that time.

A. Pratt and D. B. Webster, for complainant.

C. E. Stuart and H. Mower, for defendants.

*THE CHANCELLOR.—The defendants in their answers 421 severally and positively deny the existence of any agreement to sell the premises in question, and two of them deny all knowledge of any such pretence until a short period before the filing of this bill.

There is in proof a proposition made by defendant Sheldon, in the alternative to sell either the whole or the half of the premises. There is no sufficient proof that this proposition was accepted, and a mutual contract based upon it obligatory upon all the parties.

It is a general rule that a court of equity will not decree a specific performance where the remedy is not mutual, or one party only is bound by the agreement. (*Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 281.) It is not proved that Sheldon had authority to make the proposition from the other parties in interest, who deny all knowledge of any such claim until a very recent period, and many years after the proposition had been made. To test the right of complainant to the relief he seeks, it is but necessary to ask the question, if from the showing in the case it would have been in the power of the defendants, or any of them, if the prop-

Sill v. Ketchum.

3. The bill is bad for uncertainty, as it does not show the time of the assignment of the bond and mortgage to the complainant.

Joy & Porter, for complainant.

T. Romeyn, for defendant.

THE CHANCELLOR.—The complainant files his bill in this case as trustee for five *cestuis que trust*. The object of the bill is to foreclose a mortgage given as collateral security for a debt.

The principal question is, whether it is necessary in a case of this kind, to make the *cestuis que trust* parties to this suit.

There is a good deal of confusion in the authorities upon this subject. *Without going through the numerous and somewhat contradictory cases cited, I will refer to the remarks of Mr. Calvert in his treatise on parties, who has, I think, stated the result to be deduced from all the cases very correctly. He says, page 210, "It will be observed that Lord Eldon says in most cases respecting trust property the *cestuis que trust* should be made parties. This expression naturally suggests an inquiry, in what cases they are not to be made parties. In the cases just quoted the existence or enjoyment of the property is affected by the prayer of the bill. *But there are cases in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees*; these two classes must not be confounded together. In cases of the former class the interest of the *cestuis que trust* is immediately affected by the proceedings. Not so in cases of the latter class, for they will not lose their lien upon the property whether the trustee does or does not reduce it into possession. The duty of the trustee is to reduce it into possession, that he may have the complete execution of the trust within his own power, a duty which he must perform, and in which the *cestui que trust*, although he may compel his trustee to undertake it, ought not to bear any part: *It seems that where the prayer of the bill is confined to this object, the cestui que trust ought not to be made a party.*"

Sill v. Ketchum.

What is meant by the language here used? The reason given for the rule that the *cestuis que trust* should be made parties, is that the court may be enabled to do complete justice by deciding upon and settling all the rights of all persons interested, and preventing further litigation.

Where the object of the bill is to settle an account of trust property, it is undoubtedly necessary that all the *cestuis que trust*, or, in other words, all persons interested in the event of the suit, should be before the court. This was the case in *Hanne v. Stevens*, 1 Ver., 110, which has been referred to in several of the subsequent cases.

What is the object of the present bill? It is merely to get in the money due upon the mortgage in part execution of the trust. The rights of the *cestuis que trust* are not brought in question in this proceeding. There are no rights of these persons put in issue. The trustee assignee of this mortgage takes no more than is actually due *upon it. Under the case made by the 425 bill he does take all that is due. This litigation cannot be aided or varied, so far as I can perceive, by making the *cestuis que trust* parties. The decision would be the same upon the validity or the amount due upon the mortgage in either case. The right of the persons for whom this trustee acts cannot be affected by the collection of this money; their right to the proceeds in the hands of the trustee remains. From all reasoning in the cases cited, I am satisfied this comes within the reason of the exception to the rule, although no parallel case has been found; and unless the court is restrained by the authority of adjudged cases, every consideration of reason and convenience is in favor of this practice. Indeed, this seems to me but the duty of the trustee as the first step in the execution of his trust. If any question as to the right of any or all of the *cestuis que trust* to the proceeds should arise, then of course they must all be made parties.

As to the allegation of the assignment it shows a sufficient title to enable the complainant to sue, and is sufficient upon demurrer.

Sill v. Ketchum.

The other cause of demurrer, that the bill is not signed by counsel, is technically correct, but as it is a mere slip the bill may be amended in this particular without costs to either party.

Demurrer overruled.

Smith v. The Saginaw City Bank.

Ambrose G. Smith v. The Saginaw City Bank.

Setting aside pro confesso for answer. The general rule is that when a defendant, by whom the bill has been taken *pro confesso*, presents an answer which shows a defense, and there is an excuse shown for the default, the court will permit him to file the answer on terms.

The inclination of the court is always to permit an answer to be filed if it discloses a defense, unless there has been intentional delay.

This was an application to set aside a decree *pro confesso*, and for leave to file an answer. It was based upon affidavits excusing the delay, and the answer proposed to be filed if the decree was set aside.

A. D. Fraser, in support of the motion.

THE CHANCELLOR.—The general rule is, that where the answer shows a defense, and there is some excuse shown for the delay, the court will permit the answer to be filed on terms. If the answer discloses a defense, the inclination of the court has always been to permit it to be filed, unless the court shall believe that there has been a delay intended to retard the proceedings in the cause. I do not believe that such has been the case here.

Some attention is due to the character of the liability. Persons have been drawn into these institutions without any knowledge of the extent of their liability. This cannot shield them whenever their liabilities are fixed, but it may properly be considered upon an application to be permitted to make whatever defense they may have.

The court cannot now undertake to define or to foresee the extent, or the limit of the liability of the stockholders in these institutions, where so many may prove insolvent. It is impossible to tell where or to what extent the blow may fall.

In view of this, and of the uniform practice of this court, I do not feel myself at liberty to refuse this application, or to impose

Smith v. The Saginaw City Bank.

upon the counsel the obligation to stipulate as to the rights of their client, as asked for by the complainants.

The terms should be to pay the costs of the default and all subsequent costs as a condition, and also to receive a replication, and rule for taking proofs upon filing the answer, if the complainant shall so elect.

Order accordingly.

Street v. Dow.

Samuel Street v. Leander S. Dow and another.

Specific performance on behalf of assignee. Courts of equity recognize and protect the rights of assignees, and enforce the performance of contracts in their favor.

Contracts: Parol merged in writing. It is a general rule that a contract cannot rest partly in writing and partly in parol. Where a contract is reduced to writing, all previous parol agreements relating to the same matter are merged in the written contract. (a.)

Fraud: Laches in applying for relief. A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating it, and consistent in his notice as to the use he intends to make of it. (b.)

Bill for specific performance of a contract.

The facts, as appears by bill and answer, were, that Leander S. Dow and William Bort gave their bond to one George Harlan in the penal sum of \$3,000, conditioned for the conveyance to Harlan or his assigns, within twenty-four hours after demand, of the S. E. quarter of section 6, town 8 South range 17 west, in the State of Michigan, at any time within one year from date, provided Harlan or his assigns should previously pay the sum of \$200 in such money as would be received at the land office for the land in question, Dow holding the possession of the premises under the pre-emption laws. Harlan assigned the bond to the complainant. The defendant Dow left the State, so the money could not be paid or tendered him. The complainant offered it to Bort, who refused it, and finally paid it into the land office and obtained a land office receipt for the same in payment for the land, as described in the bond. Notice was given of the payment of the money by complainant to Bort, and a deed demanded before the expiration

(a.) See *Schwartz v. Wendell*, Wal. Ch., 267; *Adair v. Adair*, 5 Mich., 204; *Savercool v. Farwell*, 17 Mich., 308; *Martin v. Hamlin*, 18 Mich., 354; *Vanderkarr v. Thompson*, 19 Mich., 82.

(b.) See *De Armand v. Phillips*, Wal. Ch., 186; *Wilbur v. Flood*, 16 Mich., 40; *Martin v. Ash*, 20 Mich., 166; *Campau v. Van Dyke*, 15 Mich., 371.

Street v. Dow.

of the time limited in the bond. At the time the defendants executed the bond Harlan gave four notes of \$50 each to defendants, which were to be indorsed by the complainant, and they were received conditionally, and Harlan was to procure the indorsement; though no mention of this was made in the bond. This was never done except as to one of the notes. The others were retained by the defendants and put in circulation; no offer to return them to Harlan, or Street, ever having been made by the defendants.

Green & Dana, for complainant.

J. S. Chipman, for defendants.

428 *THE CHANCELLOR.—The complainant, Samuel Street, must be regarded as standing in the same situation as the original obligee of the bond would have occupied if the bond had not been assigned. Courts of chancery recognize and protect the rights of assignees. The condition of the bond is plain and clear. On the one side the obligee of the bond, Harlan, was to furnish to the said Dow two hundred dollars in money receivable at the land office, and Dow was at any time when required, upon a notice of twenty-four hours, to convey the lands mentioned in the bond by a good and sufficient deed. Dow being absent from the State under circumstances which led the complainant to apprehend that he intended to evade the fulfillment of the conditions of the bond, the complainant actually paid and applied the two hundred dollars to the purpose particularly designated in the bond to which it was to be applied. This seems to me a substantial compliance with the condition of the bond.

The money has been applied according to the conditions of the bond itself; so far, therefore, as this question rests upon the bond, the condition has been performed on the part of the obligee, and he is entitled to the land in question.

It is a general rule that a contract cannot rest partly in writing and partly in parol; but where a contract is reduced to writing,

Street v. Dow.

all previous parol contracts relating to the same matter are merged in the written contract.

It is attempted to be shown in this case that defendant Dow was induced to deliver this bond upon a promise that the four notes executed by Harlan should be indorsed by Street, which was not done except as to one. If the defendant had at the time, and before he had put the notes in circulation, insisted at once upon returning the notes and receding from the contract upon this promise, unless they were indorsed, he would have been authorized to have done so.

But having actually used and put these notes in circulation, and permitting the bond to stand, he must be considered as having waived this right. He cannot affirm and satisfy the contract by using the notes received, and at the same time disaffirm it. He must adopt one course or the other.

A party seeking to set aside a conveyance on the ground of fraud *must be prompt in communicating it, 429 and consistent in his notice as to the use he intends to make of it. (3 *Pet. R.*, 215.)

There must be a decree for a conveyance according to the conditions of the bond.

Decree accordingly.

Thayer v. Swift.

Thayer v. Jason Swift and others.

1h
1h
1w 1

Harring-
ton.
1h 430
71 429

1h 430
83 191

Creditor's bill: Remedy at law must be exhausted. A creditor's bill to reach equitable assets cannot be filed until the remedy at law has been exhausted.

The remedy at law is not exhausted until an execution has been issued and returned unsatisfied. And for this purpose it cannot be returned until the return day. (a.)

The remedy by creditor's bill is a harsh remedy, which will not be afforded unless the creditor shows a strict and rigid compliance with the rules and forms of law.

Bill in aid of execution. Where a lien has been acquired by levy of execution, or where there is an outstanding execution in the hands of an officer, and a fraudulent obstruction is interposed to prevent its being levied, a bill may be sustained for a discovery, and to remove such obstruction. (b.)

Injunction ex parte. The ground and the only ground on which injunctions are granted against persons in possession of personal property and ostensibly the rightful owners, upon an *ex parte* application, is the protection of the fund or property, when it is shown that without such interposition of the court there is danger that it may be lost to the complainant if he succeeds in establishing his title.

Trust: Receiver as against trustee. One to whom a debtor has conveyed his property to keep it beyond the reach of his creditors will be held to be a trustee for their benefit, and will be liable for all the property in his hands when suit is brought against him. But a receiver will not be appointed over one charged with being such a trustee, when there is no allegation that he is insolvent, transient or irresponsible, or that the fund is in a hazardous condition.

The complainants obtained a judgment against the defendant Swift in the circuit court for the county of Washtenaw, on the 13th December, 1839, for \$686.44 damages, and \$43.72 costs of suit. On the 31st of December, 1839 a *fi. fa.* was issued, directed to the sheriff of Washtenaw county, where Swift resides, against

(a.) To the same effect is *Smith v. Thompson*, Wal. Ch., 1; *Beach v. White*, Wal. Ch., 495. And see *Williams v. Hubbard*, 1 Mich., 446.

(b.) See *McKibben v. Barton*, 1 Mich., 213. But a bill in aid of execution can only be filed to reach those interests which are subject to sale at law. It cannot be filed to reach mere equitable interests. *Trask v. Green*, 9 Mich., 358; *Maynard v. Hoskins*, 9 Mich., 485. Compare *Cleland v. Taylor*, 3 Mich., 201.

Thayer v. Swift.

the goods, chattels, lands and tenements of Swift, and was delivered to J. K. Wallace, deputy sheriff, on the first day of January, 1840. The execution was returnable on the first Tuesday of May, 1840. On the 20th April, 1840, the sheriff by his deputy returned on said writ, "that there was no goods and chattels, lands, and tenements to be found in his bailiwick to secure or pay the sum due the complainant, or any part thereof, to his knowledge, after diligent search." The judgment remains in full force, and wholly unsatisfied.

The bill states that defendant Swift has a considerable amount of property, real and personal, which he keeps concealed, and particularly *that he deeded to defendant Banister a 431 lot in the village of Dexter, without consideration, for the purpose of keeping the same out of the way of his creditors. That since making the deed, Swift has remained in possession, and has erected thereon a brick house, and paid for the same out of his own means, though the whole business has been carried on in the name of Banister. The improvements are supposed to be worth from \$1,500 to \$2,000. The bill alleges certain other property has been purchased by Swift in the name of Banister, for the purpose of defrauding his creditors. The complainants charge that all the property described as in the name of Banister, is held in trust by him for Swift, and that he has also a large amount of notes, accounts, etc., belonging to Swift, which he is collecting for Swift's benefit. The prayer is in the usual form of a judgment creditor's bill. A preliminary injunction was granted.

Motion for receiver by complainants.

Motion for dissolution of injunction by defendants.

Miles & Wilson, for defendants.

THE CHANCELLOR.—The various questions presented under this motion involve principles of the most important and complicated character.

The consequences flowing from their decision either the one way or the other are of great importance. It is to be regretted that

Thayer v. Swift.

this question is presented under circumstances which preclude that careful examination of authorities, and that deliberate reflection which the subject demands.

Under these circumstances, I shall confine myself to the consideration of such portions of this case as may be required by the present exigency.

The first question presented is, can this bill be sustained as a judgment creditor's bill merely? The foundation of the jurisdiction of this court in this class of cases is, that the judgment creditor shall have fully exhausted his remedy at law. It has been repeatedly held that the court will not retain a bill as a judgment creditor's bill merely, filed before the return day of the execution. In the absence of any authority or dicta upon the subject, I should

have as little doubt upon a case where the execution was

432 actually returned before the return *day, although the bill was not filed until after the return day had elapsed.

Courts of chancery have held the judgment creditor in every adjudged case, before administering this harsh remedy of depriving the debtor absolutely of all control over every part and portion of his property, to bring himself strictly and rigidly within this rule.

No case can be found where this remedy has been afforded without a strict compliance with all the forms. What is the reason of the rule? It is that a judgment debtor shall not be harassed with a suit in chancery until the creditor has availed himself of all his common law rights to collect his judgment. The only *dictum* to be found which has ever led to any doubt upon this subject is to be found in the opinion of Chancellor Walworth in the case of *Cassidy v. Meacham*, 3 Paige, 312. This idea is thrown out under a perhaps, and rather as a speculation than as a decision. He says *perhaps* a return made before the return day may be good by relation. But if we once depart from the well settled rule, that the creditor shall fairly and fully first exhaust his remedy at law, where shall we stop?

Will it answer that the execution may be issued, delivered to

Thayer v. Swift.

an officer, and immediately returned, and slumber in the files of the court until after the return day has passed, and then become good by relation, notwithstanding the debtor may have been in possession of property on which to levy the execution. There is no other safe course to adopt, in administering this severe remedy, but to adhere to the well established principles which govern this class of cases; and I think the rule is too well established to be overturned by a speculative expression of this kind, which formed no part of the decision, and was unnecessary in the case. The fact that a suit of this kind has never been sustained as far as we can find, is not without its importance. I place some reliance on the manuscript case of *Ferguson v. Newstead*, cited from New York.

I have very little doubt it is correctly reported, and entirely concur in the reasoning. This is the first time I have been called upon to decide this question. Its decision is now unavoidable, and as it is now decided must be the rule in future cases upon this subject. I entertain no doubt as to what should be the rule.

The next question, whether under the allegations contained in this bill, the complainant can call upon the other defendants, the alleged trustees of the judgment debtor, is of a much more grave and important character.

*If a levy had been made, and an actual lien thus 433
been acquired, there could be no doubt.

If there was an outstanding execution in the hands of the officer, and the bill had been filed for a discovery and to remove fraudulent obstructions interposed to prevent its being levied, there could, on general principles, exist but little difficulty. Here it is not averred that there has been any attempt to levy this execution upon this property, and there is no outstanding execution in aid of which the extraordinary powers of this court are invoked. I am inclined to think, however, and to hold for the purpose of this motion, that the complainant, under the showing contained in his bill may sustain it for the purpose of making this trust

Thayer v. Swift.

property available, if it really has any existence, for the liquidation of his judgment. (a.)

It is, however, urged that the injunction granted in this case against the assignees, is neither required nor justified by the allegations contained in the bill. The ground, and only ground, upon which injunctions against third persons in possession of personal property, and ostensibly its rightful owners, upon an *ex parte* application, are granted, is for the protection of the fund or the property, when it is shown to be in danger without this interposition.

Here there is no allegation that these trustees are insolvent, transient, or irresponsible. It was held in the case of *Hadden v. Spader*, 20 Johns. R., 570, that it makes no difference whether the goods are converted into money or not; the trustees are equally responsible to the creditor if he establishes his right to the goods or their proceeds, and if paid away by the trustees *pendente lite*, they are held personally responsible. Under these circumstances, it should certainly be required in order to sustain an injunction which may operate with such extreme severity, that it should be shown that the fund is in a hazardous condition. Such has been the usual practice of the court. But as certain real estate, the title to which is not vested in these trustees, is alleged to belong to this judgment debtor, and any transfer or encumbrances upon that may lead to the necessity of making new parties, the injunction in that respect may stand until the coming in of the answer. It results then, that the bill cannot be sustained as a judgment creditor's bill merely.

434 *It also results that the general injunction against Swift must be dissolved. That the injunction against the other defendants be dissolved, except so far as relates to the real estate alleged to be the property of the defendant Swift.

The motion for the appointment of a receiver, as against Swift, must be denied, and as the other defendants, in opposition to the

(a.) This is inconsistent with the case of *McKibben v. Barton*, 1 Mich., 213, in which it was held essential that a levy should actually be made.

Thayer v. Swift.

motion for a receiver, deny absolutely having or holding any property, rights, credits or effects of Swift of any kind, a receiver of the alleged trust property cannot be granted until they have an opportunity of answering the bill.

 Stafford v. Hulbert.

Spencer Stafford v. T. J. Hulbert.

 v 435
 w 1
 382
 397

Creditor's bill: Premature return of execution. A creditor's bill cannot be sustained where the return of execution was made more than a month before the return day, notwithstanding the bill was actually filed after the return day. (a.)

This was a motion to dissolve injunction for want of equity in the bill.

The facts will appear sufficiently in the opinion of the court.

THE CHANCELLOR.—This is a creditor's bill merely. It appears from the bill that the execution was returned by the sheriff more than a month before the return day, but that the bill was not filed until after the return day had passed.

Several other questions were raised upon this motion, but since from the views taken in the case of *Thayer v. Swift and others*, decided in the second circuit, this must be decisive of the case, it will not be necessary to notice them all. The practice of the court and the reason of it are set forth in that case at length, and I adhere to the opinions therein expressed.

It may be proper to say, since that case was decided I have seen an extract from the record in the case of *Ferguson v. Newstead et al.*, referred to, from which it appears that the newspaper report is correct, and that the case turned upon the question here presented, and that the demurrer was allowed.

A question was raised as to the reception of the affidavit stating that the return of the officer upon the execution was limited only to goods and chattels, and that it does not appear but that the

(a.) The doctrine of this case and of the preceding case of *Thayer v. Swift*, was examined more at length and fully approved and indorsed by Chancellor Manning in *Smith v. Thompson*, Wal. Ch., 1, and has ever since been considered settled in this State. The equity courts have always administered the harsh remedy by creditor's bill with caution, and only where the preliminary requisites have been strictly complied with.

Stafford v. Hulbert.

defendant was possessed of lands and tenements out of which the money could have been made.

From the view taken upon the first point it is not necessary to decide this question.

Where the affidavit shows a distinct fact, and that the well settled practice of the court has been departed from, I am induced to believe that the affidavit may be received.

Motion granted.

Whipple v. Brown.

Charles W. Whipple v. Cullen Brown and others.

Contempt: Proof of failure to comply with order. The return of a master charged with the execution of an order of court, showing the failure of a person to appear and submit to an examination as required by the order, is sufficient foundation for a rule to show cause why an attachment for contempt should not issue.

But the affidavit or return of service of the master's summons, should show the time and manner of service. Where the affidavit of service was in general terms that the summons was served as required by the rule of court, and the respondent made an affidavit showing that it was served less than a full day before the time for appearance, the service was held insufficient.

Where a notice was to appear before one master, and return was made by another that the defendant did not appear; *held*, not to show any failure of defendant to comply.

This was a rule for the defendant Brown to show cause why an attachment should not issue for contempt in not obeying a master's summons to appear at the master's office, and submit to an examination under a creditor's bill. A receiver had previously been appointed after a master's summons served on defendants for the purpose, and on April 5, 1842, an *ex parte* order was entered that Brown appear before a master, and submit to an examination. A summons was issued on the 22d of the same month, returnable on the 24th, and a return was made by the master, accompanied by the affidavit of Mr. Holbrook, that notice of the reference was served upon Brown the usual time pursuant to the seventy-second rule. (a.)

The notice was to appear before Jeremiah Van Rensselaer, a master of the court, to whom it stated the execution of the order was committed, but the return to the order was made by Mr. Dalton, another master, that Brown did not appear before him in pursuance of the order and summons. Upon this return, the rule to show cause was entered.

(a.) This rule required the service to be not less than two days in any case.

Whipple v. Brown.

In opposition to the rule Brown made an affidavit that the notice to appear for examination was served upon him at half-past two o'clock P. M. of the 23d, the day before the time of appearance, which was at ten o'clock A. M. of the 24th. He also affirmed that no other notice had been served upon him in the cause except the summons of the master on the reference to appoint a receiver, to which he responded.

A. Davidson, for complainant.

D. Stewart, for defendants.

THE CHANCELLOR.—The return of a master, charged with the execution of an order of this court, is a sufficient foundation for a rule to show cause; but that rule having been taken *ex parte*, it is competent now for the respondent to show cause against granting the attachment.

The defendant swears positively that the notice to appear before the master was served only some eighteen hours before the time he was required to appear, and he specifies the time of service, and when he was required to appear. The master in his return refers to the affidavit of Mr. Holbrook, as to the mode of service.

On looking at this affidavit of service, it is perceived that he does not specify when or how it was served, but that it was the usual time pursuant to the seventy-second rule. It shows his conclusion; the facts should be stated in order to enable the court to judge.

*It strikes me that a copy of the notice should have 437 been returned with the proof of service indorsed. Brown also swears that no other notice has been served upon him in the cause, except the summons of the master, for the purpose of appointing a receiver, which was obeyed.

This proceeding I think has been irregular, and the court is bound on this motion to notice it.

The notice and return under the rule to show cause are also irregular. The notice to Brown under this rule is to appear before the master, in four days, etc. The notice as returned,

Whipple v. Brown

indorsed upon the order is, that Jeremiah Van Rensselaer, jr., a master of this court, had the execution of the order referred to.

The return upon the order is made by Mr. Dalton, that the respondent did not appear before *him*, pursuant to the order. The notice did not require the respondent to appear before him, but before Mr. Van Rensselaer, and *non constat* but that he has appeared according to notice.

While on the one hand there is no escape from the proceeding under this class of bills, when the proceedings are regular, on the other, such is the severity of its operation, it would be hazardous to the rights of the parties defendant, if the courts were to relax the strictness of the proceedings, and attach a party when in fact, as appears here, the notice has been clearly irregular.

Motion denied.

Hammond v. Place.

Hammond and others v. Place and others.

Amended bill, application for leave to file. It is not a matter of course to allow the filing of an amended bill after the cause has been put at issue and testimony taken. A special application should be made to the court, with a full statement of the facts proposed to be incorporated in the amended bill, so that the court can judge of the propriety of giving leave. (a.)

Amended bill, what may be set forth in. Facts which have transpired since suit commenced cannot be set forth by way of amendment.

Rule by consent: Vacating same. A rule entered by consent will not be vacated unless fraud or misrepresentation is made to appear.

This cause being at issue, and testimony having been taken, the parties, by their solicitors, at the last term of court, entered a rule by consent granting to the complainants leave to file an amended bill. A motion was now made to set aside this rule, on the ground that it should have been made by the court, after a showing of such facts as would indicate its propriety.

J. Kingsley, in support of the motion.

O. Hawkins, contra.

THE CHANCELLOR.—The filing of an amended bill of complaint at this stage of the cause is not a matter of course. Application should be made to the court for that purpose, and a full statement of the facts intended to be incorporated as amendments should be

(a.) The complainant should make his application for leave to amend at the earliest opportunity after being made acquainted with the defects in it. *Bank of Michigan v. Niles*, Wal. Ch., 398. Leave may be given even after a cause has been set down for hearing on pleadings and proofs, if material facts have then for the first time come to complainant's knowledge. *Briggs v. Briggs*, 20 Mich., 34. Formal defects may be amended at the hearing without opening the proofs where they do not affect the issue or prejudice the right of defendant. *Gorham v. Wing*, 10 Mich., 486; *Goodenow v. Curtis*, 18 Mich., 298; *Babcock v. Twist*, 19 Mich., 516. Amendments cannot be made in the supreme court on appeal. *Bank of Michigan v. Niles*, Wal. Ch., 398; *Sears v. Schwarz*, 1 Doug. Mich., 504. But in a proper case there may be a remand to the circuit court with leave to amend there. *Palmer v. Rich*, 12 Mich., 414; *Moran v. Palmer*, 13 Mich., 367. See *House v. Dexter*, 9 Mich., 246.

Hammond v. Place.

set forth. Their materiality must appear, for it would be absurd to think that a cause would be delayed for the purpose of filing an amended bill, that would not in the least change the legal effect of the original statement. It is a well settled rule also, that facts which have transpired since the commencement of the suit, cannot be set forth by way of amendment to the original bill. If the complainants wish to take advantage of any such facts, they must do it by a supplemental bill. An amended bill relates back to the time when the original bill was filed, and it is considered but one bill, and cannot be separated.

But in this case, the rule for leave to file an amended bill was entered in open court by consent. The court will not interfere to set aside a rule or order thus entered. It is a matter of great convenience for solicitors to agree to rules, and if the court would vacate them upon application of either party, without its
439 appearing they *were entered into under a mistake, or by fraudulent representations, such rules would tend to confusion rather than convenience. In *2 Cox R.*, 156, and *1 Moul. Pr.*, 36, it is laid down that consent rules will not be vacated.

Motion denied.

Catharine E. Schwarz and others v. Nathan Sears and others.

Injunction, motion to dissolve. On motion to dissolve an injunction before answer, the allegations in the bill are to be taken as true.

Deposit in court, when dispensed with. Where a party comes to have a foreclosure set aside and for leave to redeem, he must bring into court the amount admitted to be due. The deposit will only be dispensed with where there is uncertainty as to the amount due.

Setting aside foreclosure at law. A foreclosure under the power of sale, if made for an excessive amount, may be set aside before the proceedings under it are perfected, on a bill filed by the debtor for leave to redeem on paying the amount due.

The bill in this case was filed for the purpose of setting aside a foreclosure of mortgage under the statute, and to redeem from the same. There was a dispute between the mortgagor and mortgagee as to the real amount due upon the mortgage, usury being charged, and also certain payments which had not been allowed in the foreclosure. An injunction was granted on the filing of the bill, to restrain the defendants from perfecting their proceedings under the statute foreclosure, and from procuring a deed from the sheriff. The case now came before the court on a motion to dissolve the injunction before answer.

A. W. Buel, in support of the motion, contended that the injunction should be dissolved.

1. Because there is no equity in the bill.
2. If there be equity in the bill, the balance due upon the mortgage should have been brought into court.

By the complainants' bill the court is in possession of the whole case, and having the power to do equity as well to the defendants as to the complainants, will exercise that power, and for such purpose will refer the case to a master to ascertain the amount due,

Schwarz v. Sears.

and will order a sale of the premises upon such terms as are just and equitable.

A party seeking equity must do equity; when a party comes into a court of equity for relief he will be compelled to do equity to others. (2 *Cow. R.*, 139.)

441 *Where a party seeks equitable relief against usury, he must first bring into court the money actually loaned with legal interest. (1 *Johns. Ch.*, 356; 1 *T. R.*, 153; 1 *Puige R.*, 429.)

This case comes within the spirit of the statute, and for that reason we contend the money should have been brought into court. As to the meaning of the term "proceedings at law," see 1 *Hoff. Ch. Pr.*, 88, 89; also note to page 89, showing that chancery proceedings come within the spirit of the phrase "proceedings at law," and that proceedings in chancery would not be restrained without bringing the money into court.

A. D. Fraser, contra.

Under the motion to dissolve the injunction in this case two positions are assumed by the defendants: *First*, that there is no equity in the bill; and *second*, that if there is, the complainant should have brought the balance due into court.

The complainants insist upon the negative of both these positions; for:

1. The bill sets out various grounds for the equitable interposition of the court.

2. This case does not fall within the rule applicable to that class of cases in which the money is required to be brought into court. That rule appears to have reference to personal actions at law in which judgment has been obtained, or an award, and in certain cases where the defendant's answer shows a certain sum to be due. The rule is discretionary in some of those cases, but the principle is wholly inapplicable to this case. (*Eden*, 82, 83; 2 *Ves. & Beames*, 74; 1 *Puige R.*, 426; 4 *Wash. C. C.*, 178.)

Schwarz v. Sears.

THE CHANCELLOR.—This is a motion to dissolve an injunction

1. For want of equity in the bill.
2. For that the complainants have not brought into court the amount due.

There is sufficient stated in the bill to warrant the interference of the court, and as the case now stands, to require that this court should afford the complainants the protection they ask. The defendants not having answered the allegations of the bill, it must be taken to be true, for the purposes of this motion.

*But it is further urged that the complainants should 442 be required to bring the amount actually due into court.

The court in its discretion may require as a condition of granting the continuance of an injunction that the complainants bring the amount apparently due into court. It is a general rule that when a party comes into a court of equity for relief he must do equity.

The cases where the deposit of money is dispensed with when relief of this kind is sought for in this court, are, where there is uncertainty as to the amount due, or doubt whether in the progress of the cause it may not turn out that no part of the claim should be paid; such is not the case here.

It is admitted by the bill that there is a balance due upon the mortgage which they profess their readiness to pay, and which can be as well ascertained now, by reference to a master to compute the amount due after deducting the several payments, as at any other stage of the cause.

If the defendants choose to submit to the case as made by the bill, I can see no reason why they should be subjected to the expense of answering.

The complainants, by the course pursued by the defendants, were compelled to come into this court to obtain relief, and as the case now stands I see no reason why they are not entitled to the relief they ask. The complainants proffer their readiness to pay the amount actually due, and as preliminary to granting them the relief they ask, they should be required to do so.

Let it be referred to a master to compute the amount remaining

Schwarz v. Sears.

due after deducting all payments which have been made; and it is ordered that the complainants, within sixty days after such report becomes absolute, shall deposit in this court, subject to the order of this court, the amount remaining due, with interest from the date of the report; and upon compliance with said order, the injunction to stand until further order.

Cook v. Wheeler.

Elijah F. Cook and others v. Russell M. Wheeler.

General banking law: Enforcing claims against stockholders. Where by a general law for the incorporation of banks, the directors and stockholders are made individually liable for all debts, and an assignee of a demand is proceeding to enforce it against them, it is immaterial whether he paid full value for it, as they are liable for the whole whether he did or not.

1h	443
6	78
8	290

Fraudulent partners are also liable to the assignee for the whole amount of a partnership debt, whether he paid full value or not.

Where, therefore, a bill was filed against parties charged as being directors and stockholders in a bank organized under the general banking law of 1837, or, in the alternative, as being fraudulent partners, the object of the bill being to enforce payment of notes of the bank, it was *held*, that defendants were not entitled to file a cross-bill, to compel complainant to disclose when he became owner of the notes, or how much he paid for them; as such discovery would be immaterial to the defense. (a.)

Parties: Cestuis que trust. Where the object of the bill is merely to collect money, it is not necessary for the complainant to make a *cestui que trust* a party; though it would be otherwise if the existence or enjoyment of the trust property were to be affected. (b.)

This was a hearing on demurrer to a cross-bill. The case on the original bill is reported *post*, p. 449.

The bill was for a discovery, and stated that some time in the month of January, 1841, defendant Wheeler filed his bill in this court against complainants and others, as being or having been directors and stockholders of an institution established under the general banking law, and called the Clinton Canal Bank, charging them with a fraudulent combination to injure the creditors of said corporation or association, setting forth various particulars which he alleged to constitute such fraud, and seeking satisfaction from them individually, as being a creditor of said bank by reason of holding its notes to the amount of \$2,594, and also two certificates or receipts given by Seth Beach, as receiver of said

(a.) See note, p. 448.

(b.) Approved and followed in *Martin v. McReynolds*, 6 Mich., 70. See *Sill v. Ketcham*, *ante*, p. 423, and note.

Cook v. Wheeler.

bank, to R. D. Hill, for notes of the bank received by said bank of said Hill, amounting to \$1,002, which were transferred to said Wheeler by said Hill. That an injunction was issued according to the prayer of said bill against the several defendants therein named; that the complainants in this suit appeared in said cause and filed their demurrer to the bill of complaint therein; that said demurrer was overruled, and they were required to answer said bill in twenty days after service of the order entered for that purpose, which service was made on or about the 23d day of April, 1841. That Wheeler in his bill omitted to state how, or at what time, he became possessed of the notes and certificates therein mentioned, or the consideration, if any, paid for the same. Charges that defendant did not obtain possession of them until long after the bank stopped payment,

444 *and that if he is the *bona fide* owner, he obtained them for much less than their face, and that if said receipts have been transferred to him it was in trust for said Hill or some other person; and if any consideration was paid, it was merely colorable. That said bills were bought up by said Wheeler, or said Hill, or some other person, on speculation after the bank had stopped doing business, and that if anything is realized by said Wheeler under his said bill, it is to be shared between himself and some other persons according to some stipulations entered into when the notes and receipts were obtained by him. Prays a discovery from Wheeler to enable the complainants to make their defense to his bill.

The defendant demurred specially.

E. C. Seaman, in support of the demurrer.

1. The complainants have not made such a case as entitles them in a court of equity to a discovery. The discovery sought would be immaterial, and could not avail complainants for the purpose they intend to use it for.

2. So much of their bill as relates to the consideration paid by defendant, and any agreement relating to the bills and receipts

Cook v. Wheeler.

whereby Hill was to retain any share of the proceeds, can be sustained only on the ground of champerty and maintenance, which would subject defendant to a forfeiture which complainants have not waived.

3. The matters sought to be discovered relate exclusively to defendant's title, and cannot affect complainants' liability; and the interrogatories founded thereon are indefinite, hypothetical and impertinent, and the bill a mere fishing proceeding, inquiring through idle curiosity into what does not concern the complainants or either of them.

T. Romeyn, contra.

I. In support of the cross-bill the complainants therein contend that they have a right to the discovery of the title of the defendant to the demands in dispute.

If the defendant be not in fact the equitable and beneficial owner of these demands, his original bill must fail for want of parties—this court requiring in all cases the parties interested in the object of the suit to be before it.

*This rule is especially rigid so far as the rights of a 445 complainant are concerned; the court compelling the true party to be before it even where there has been an assignment subsequent to the commencement of the suit. (*Mills v. Hoag*, 7 *Paige R.*, 21; *Sedgwick v. Cleaveland*, 7 *Paige R.*, 289.) On these general principles we contend that the inquiry as to the title of the defendant is material and proper.

We further claim that this is the case under the statute, upon which the original bill is founded.

The statute of 1839 (p. 94) is the only source of jurisdiction and guide to procedure in this case; the remedy at law being complete, and the original bill (even if this court had jurisdiction independent of the statute) being multifarious and otherwise bad.

The statute in question gives the remedy to the creditor of the corporation. (See *Laws of 1837*, pp. 306, 307; *Laws of 1839*, p. 102.)

Cook v. Wheeler.

Hence the propriety of the inquiry as to the title of the complainant in the original bill.

This inquiry is material.

1. Under the statute—because it declares that none but a creditor shall sue.

2. There may be equities between other actual creditors and the defendants, which will be defeated by allowing a trustee to sue.

The propriety of making the *bona fide* creditor the complainant is farther evident from the next subject of inquiry in the cross-bill—which is as to the consideration paid by the complainants in the original bill for the claims against the defendant.

II. The complainants in the cross-bill further contend that they have a right to the discovery of the amount paid by the defendant for the demands on which he seeks to recover in his original bill of complaint.

The proposition is that the complainant in the original bill can be treated in this court as a creditor only to the amount which he actually paid for the demands which he seeks by that bill to enforce.

I assume that the original bill must be considered as filed for the benefit of all the creditors of the bank, and that the moneys received under the decree must be considered as a common fund for the benefit of all the creditors.

446 *By referring to section 17 of the act of 1839 (p. 98), we find that the receivers are made subject to all the obligations imposed by law on trustees of insolvent debtors.

In R. S., p. 606, sec. 1, we have a definition of this term, and in the same volume, p. 603, sec. 8, we find a positive enactment that a petitioning creditor, who shall have purchased or procured to be assigned to him a claim against the insolvent for less than its nominal amount, shall be deemed a creditor to the amount only actually paid by him.

These enactments bind the receiver and this court.

And such would be the rule on general principles, independent of these statutes.

Equity administers legal assets on equitable principles. (3 *Paige*, 167.)

Equality is equity. (*Ib.*; also 1 *Paige*, 255.)

Receivers are bound to inquire into the equitable character of the debts presented to them. (4 *Paige*, 224.)

These general principles will be found recognized and applied by Chancellor Walworth. (7 *Paige*, 615. See also *Edwards on Receivers*, 233.)

Under these circumstances it is submitted that the inquiry as to the amount paid by the defendant for the claims which he seeks to enforce is pertinent and material. He seeks to recover of the complainants connected with the bank, in case the bank was legally in existence.

Is the defendant protected from the disclosure?

A number of authorities are cited by the defendant to show that he is not obliged to discover his own title.

These authorities all have reference to *real estate*, and they all rest on the principle that a party must recover on the strength of his own title, and is not entitled to any discovery of the defects of his adversary's title when such discovery does not tend to establish *affirmatively* the *plaintiff's* case.

Is this our case? Is not the discovery we seek in *affirmance* of our own defense, just as much as a discovery of payment or satisfaction? *Concede the principle that complainant 447 in the original bill is to be deemed a creditor, so far only as he has paid value for his demands, and you concede this point. For if this be so, it is a part of our defense; and in what way can we examine the original complainant touching the defense but by a cross-bill? (*Story's Eq. Pl.*, 311, 312.)

But in truth the rules insisted on by the defendant in this cross suit grew out of the rules relating to this case; and if they were, they do not affect the right of the *defendant* (in the original suit) to a discovery. A defendant has a right to a discovery of the defects in the plaintiff's title. (See *Hare on Discovery*, 203, 204.)

Cook v. Wheeler.

THE CHANCELLOR.—The original bill in this case was filed for the purpose of enforcing the liability of the defendants in that case, a part of whom are the complainants in this cross-bill, as directors and stockholders of the Clinton Canal Bank, an institution organized under the general banking law of this State. In order to arrive at a result upon the questions presented upon this demurrer it will be necessary to give a construction to the provisions of the statute bearing upon this class of corporations.

By the 25th section of the original act (*Laws of 1837, p. 84*), and by the 21st section of the amendatory act (*Laws of 1838, p. 32*), the directors are made liable for the amount which an insolvent institution organized under these acts may be indebted, and the stockholders are secondarily made liable for the debts of any such insolvent institution in proportion to the amount of stock of any such stockholders.

The 42d section of the act of 1839 (*page 102 of the Laws of that year*) provides that whenever any creditor of a corporation shall seek to charge the directors, trustees or other superintending officers of such corporation, or the stockholders, on account of any liability created by law, he may file his bill for that purpose in the court of chancery.

By the act under which this bank was organized the liabilities of the directors and stockholders were fixed. The act of 1839 prescribed the mode in which a creditor may enforce this liability.

The original bill in this case seeks to charge the directors and stockholders *as such under the act, or in the alternative as partners fraudulently combining under color of the general banking law.

For the purpose of a defense to the original bill the discovery sought by the cross-bill is immaterial. The statute makes the directors and stockholders liable for all deficits in consequence of the insolvency of the bank.

If the defendants are fraudulent copartners, they are equally liable for the entire amount of the indebtedness of the concern. It is not alleged that the money is not actually due from the

Cook v. Wheeler.

defendants, and the mere fact that, from the course pursued by the stockholders and officers of the bank, their notes had become depreciated in the market, would not discharge them from their liability, which is for the entire amount of the indebtedness of the concern.

It is not alleged that the complainant is not the assignee of the certificates, but it is alleged that if he is the assignee of the certificates, and holder of the bills, he holds them as trustee for Hill, or some other person or persons. Where the object of the bill is merely to collect money or reduce it to possession, it is not necessary for an assignee either of a bond, note or chose in action, to make the *cestuis que trust* parties, although the rule is otherwise where the existence or enjoyment of trust property is to be affected by the prayer of the suit. (*Calvert on Parties*, 17.)

There is no pretence that the amount claimed by the bill is not due, and I do not perceive how the discovery sought for by the cross-bill can constitute a defense.

Demurrer allowed. (a.)

(a.) The act which gave occasion for the case here decided was one of the most important in its results in the whole history of legislation in the State. It was a general law for the incorporation of voluntary associations formed for the purpose of engaging in the business of banking, and was passed March 15, 1837, when speculation was more rife and wild, perhaps, in proportion to the means for carrying it on, than at any other time in the history of the country. That it was meant to establish a safe and prudent system of banking there can be no doubt. No bank was to commence operations until thirty per cent at least of its capital stock was paid in, in specie, and at least ten per cent more was to be paid in as often as every six months thereafter. The association was to furnish real estate security to be held by the auditor-general for all its indebtedness; directors and stockholders were made personally liable for debts in case of insolvency, periodical reports were required, and periodical examinations by a bank commissioner provided for. All these securities, however, proved wholly insufficient. There was no sufficient capital in the State for the banks formed, and they were consequently brought into existence by means of evasions. Ingenious devices were resorted to for the purpose of deceiving and misleading the examiner; and well authenticated stories are told of a single bag of specie being made to perform the duty of reserve for several banks while the bank commissioner was on his tour of inspection, until by doubling on his course and repeating his visits he was able to verify the fraud he suspected. The collapse of the system so soon as a check should come to speculation was inevitable. The number of the banks was far beyond any wants of the State except for speculative purposes; the borrowers were mostly speculators whose paper was good only while speculation

Cook v. Wheeler.

was successful, and the real estate security became utterly unavailable the moment lands came to be in demand only for actual occupation, and at their real value. It became so not only because the demand was then very light with abundance of eager sellers, but because, also, it was found, as indeed ought to have been anticipated, that the securities generally had been based upon the wildest estimates of value, which for a generation were not likely to be realized by actual sales. The "wild cat currency," as it was not inappropriately called, speedily became nearly or quite worthless, and the people who had been so unfortunate as not to succeed in getting it off their hands in exchange for anything of value, began to look about for some remedy beyond what might be had against the deceptive assets of the banks. Suits against directors and stockholders were then resorted to, but they generally proved of little avail.

Meantime receivers of the several banks, appointed by the court of chancery, were proceeding to collect their dues, so far as they might find it practicable to do so. A suit for this purpose came on for hearing in the supreme court in January term, 1844, when after full argument the court declared its opinion that the act under which these associations were formed was unconstitutional. The point was that the constitution provided that "the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house;" and this was construed to require the direct agency of the legislature to create each particular corporation by two-third vote. The result was to sweep out of existence not only all the banks, but all the indebtedness by and to them.

The question then remained whether those who had created these debts on behalf of the banking associations might not in some way be made liable for them. In *State v. How*, reported in appendix to 1 Mich., 512, it was claimed that if the associates never became a corporation, they must have been partners, and liable for debts as such; but Chancellor Manning held that, if not incorporated, their business was illegal under the statutes forbidding unauthorized banking, and therefore contracts growing out of it could not be enforced. The same decision was made by the supreme court in *Brooks v. Hill*, 1 Mich., 118. Those cases must in effect be regarded as overruling the views of Chancellor Farnsworth in this and the following case, which, however, were expressed before the supreme court had declared the general banking law unconstitutional, and were doubtless entirely correct on the assumption of the validity of that law.

Wheeler v. Clinton Canal Bank.

Russell M. Wheeler v. The Clinton Canal Bank, William S. Stephens and others.

1h 445
82 892
43 812
80 479

Fraudulent associates assuming to be a corporation. Where defendants are charged as fraudulent associates, who under the pretence and color of a general incorporation act have combined to defraud complainant, the fact that another creditor has seen fit to treat them as a corporation, and obtained the appointment of a receiver, is no bar to complainant's suit.

Fraud: Creditor's bill. A bill to enforce a demand thus contracted is not what is called a creditor's bill, and it is not essential that there should have been judgment and execution at law before it can be filed.

Fraud: Remedy at law. Courts of equity have concurrent jurisdiction with courts of law where fraud is charged.

If the remedy at law is difficult or doubtful, equity will entertain jurisdiction. (a.)

Multifariousness. Where parties are charged as fraudulent associates under pretence of a corporation, the bill is not rendered multifarious by the fact that the defendants were connected with the association at different periods and in different capacities, and may have different liabilities.

Bill against fraudulent associates: Parties. In proceeding thus against parties as fraudulent associates, it is not necessary to join as defendant the receiver previously appointed in the suit against them as a corporation.

This was a hearing on demurrers.

The bill states, that under the act known as the general banking law, books were opened at Pontiac, in the county of Oakland, on or about the 20th day of November, 1837, to receive subscriptions for a banking association to be located at that place, and called the "Clinton Canal Bank," with a capital stock of fifty thousand dollars, to be divided into one thousand shares of fifty dollars each. That the whole amount of stock was taken, and that on the 23d day of November, 1837, an election of directors and officers of said bank was duly held. That bonds were executed and filed with the auditor-general, and the directors and stockholders, claiming to have complied with the provisions of law,

(a.) To the same effect are *Ankrum v. Woodworth*, ante, 355; *Edsell v. Briggs*, 20 Mich., 429.

Wheeler v. Clinton Canal Bank.

issued their bills, and commenced banking business under their corporate name on or about the 11th day of December, 1837. The bill then sets out several assignments and transfers of stock, and consequent changes of officers, and states that in pursuance of an act amendatory to the general banking law, different
450 bonds and mortgages were executed to *the auditor-general as collateral security, at various times from some time in March, 1838, to some time in May of the same year. It then sets out further assignments and changes of officers, and prays a discovery of such other stockholders and officers as may have been interested in said bank. States that the bank continued to do business until about August 22d, 1838, since which time it ceased to carry it on, and has had no officers or offices during the past year. That the bank went into operation under, and availed itself of the provisions of the suspension law of June 22d, 1837, and did not make a practice of paying its liabilities in specie until about May 16th, 1838. That only \$2,220.95 of the capital stock was paid in specie, and the balance of the first thirty per cent was paid in specie certificates and stock notes, none of which have been paid, and that no more than the first thirty per cent of the capital stock has ever been paid in. That on the 24th day of February, 1838, the bank had on hand in specie only \$3,164.85, that the average amount on hand from the time of commencing business up to the 16th of May, 1838, was less than three thousand dollars, and at no time amounted to more than three thousand five hundred dollars. That on the 24th day of February, aforesaid, their circulation amounted to \$30,456, and their indebtedness, exclusive of circulation, to \$7,867. That on the same day the amount due to the bank from its directors was \$6,390.81, from stockholders \$3,580 and from other persons \$20,462.80. That previous to the injunction issued in October, 1838, the bank had in circulation over \$39,000, and time drafts amounting to more than \$25,000, most of which are unpaid, and parcels have been presented for payment from time to time, and payment refused. Charges that during the whole period of its operation, the directors

Wheeler v. Clinton Canal Bank.

and stockholders owed the bank more than four times the amount of specie and good funds paid in; that at the time when it stopped business, William S. Stevens, a director, was owing nearly \$20,000, Charles Hubbell, another director, more than \$5,000, and other directors and stockholders owed considerable sums, and that the whole amount of assets reported by the receiver, including these debts, is less than \$50,000, most of which he considers doubtful. That the bank has never been solvent since January, 1838, and cannot pay more than ten per cent of its liabilities, and has no property *which can be reached at law. Charges 451 the subscribers to the bank with forming the association for fraudulent purposes, and that all the stockholders knew and participated in their fraudulent designs and operations. States that complainant is a creditor of the bank, holding its notes and receiver's certificates; that they were presented to the receiver for payment and payment refused. Charges that defendants are individually liable. Prays the appointment of a receiver, and satisfaction from the assets and property of defendants.

The defendants demurred to the bill, and assigned the following causes:

1. That complainant had an adequate remedy at law.
2. That a receiver has been appointed, and it does not appear that there will be any deficiency of assets.
3. That the defendants are charged in different capacities, and having distinct liabilities.
4. That the stockholders cannot be charged until the property of the directors is found insufficient.
5. That there is no sufficient equity in the bill.
6. That the bill prays for a receiver, while it shows one to have been already appointed, without asking his removal, or showing it to be necessary.

W. Draper appeared for D. Paddock and others.

S. G. Watson, for William Phelps.

Richardson & Knight, for Alfred Judson and others.

Wheeler v. Clinton Canal Bank.

W. F. Mosely, in person.

Counsel for defendants contended that it appears by the said bill that the same is exhibited against the individual defendants and the Clinton Canal Bank, for several and distinct matters and causes, in many of which it appears the individual defendants are not in any manner interested or concerned.

"If a bill blends together a demand by the plaintiff as legatee against the defendant as executor with a demand of the plaintiff in his private capacity against the defendant in his individual character, it is good cause of demurrer." (4 *Johns. Ch.*, 199.)

"If a bill be brought concerning things of distinct
452 nature against several persons, or against one, it is demurrable. (2 *Mad. Ch.*, 234. See also 5 *Paige*, 79.) In that case the court says: "The form and effect of a demurrer to a bill in chancery for multifariousness is substantially the same as a demurrer to a declaration at law for a misjoinder of parties, or of different causes of actions which cannot be properly litigated in the same suit." "And where a joint claim against two defendants is improperly joined in the same bill with a separate claim against one defendant only, either or both may demur." And the same principle is found in 6 *Paige*, 28, and the authorities there cited.

By said bill it appears that the said association of persons never became a legal corporation or banking company in accordance with the statute.

By the act to organize and regulate banking associations, passed March 15, 1837, it is enacted that "no such association shall commence operations until thirty per centum of the capital stock shall be paid in, in legal money of the United States."

The bill alleges that the whole of the stock was taken, and that "only \$2,220.95 of the capital stock was paid in in specie, the balance of the thirty per cent being paid in specie certificates or stock notes; that no more was ever paid in, and that none of the certificates or stock notes have been paid." See 9th section of act

Wheeler v. Clinton Canal Bank.

of 1837, where it says that "all such persons as shall become stockholders of any such association shall, in compliance with the provisions of this act, constitute a body politic in fact and in name, etc."

By said bill it does not appear that any matter is set forth in said complainant's bill for which he has not an adequate remedy in a court of law.

The rule is that in general, courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice. The present suit is brought to recover the amount of the bills and receiver's receipts now in possession of the complainant. The statute directs that all demands against the bank after the appointment of a receiver, shall be presented to him; and a mode of proceeding is prescribed by which all the assets of the bank are to be applied to their payment. Here is an adequate statutory remedy, so far at least as the assets extend.

There is also an adequate legal remedy which may be pursued upon the liability of the defendants, as a bank, as directors, and as stockholders.

The receiver of the bank, as such, is vested with all the estate of the bank, and is a trustee for the creditors and stockholders.

By the tenth section of the laws of 1839, page 96, the receiver is vested with all the estate, real and personal, of the corporation, etc., and is the trustee of the estate, for the benefit of creditors and stockholders.

By the eighth section, the chancellor is authorized to appoint receivers, etc., and on such appointment the corporation shall thereupon be dissolved, and shall cease to exist.

As such trustee the receiver is the only accountable person, the corporation is defunct, the powers of the defendants, their rights and duties, abrogated, and passed over by operation of law to the receiver, the only person known in the law, in the place of said corporation. As to power of trustees, see 6 *Munf. R.*, 366; 2 *Paige*, 21, 438.

Wheeler v. Clinton Canal Bank.

The bill prays for the appointment of a receiver, when it appears from said bill that a receiver had before been appointed to take charge of the estate and effects of said bank, without showing that said appointment had been obtained by collusion or fraud, or that said receiver was an improper person to discharge the duties of said trust, and seeking his removal.

The remedy of the complainant, for the appointment of a new receiver, is by filing a supplemental bill. (See *5 Paige*, 454 46.) And although *the forty-second section of the act allows any creditor to file his bill against directors and trustees, and to proceed as in other cases, yet it was never intended to apply in a case where a receiver had been appointed, and the property and effects transferred from the bank and its officers to the trustee.

It would in effect be authorizing the creditor to do an act by which he could derive no benefit whatever.

If the receiver is an improper person, then the remedy was by removal, on application, founded on petition or affidavits or other evidence of improper conduct, and that the trust funds were in danger of being squandered. (See *Hopk. Rep.*, 435.)

The complainant has not alleged that he had obtained any judgment or decree against the defendants or either of them, or that executions had been issued and returned unsatisfied.

This suit, having been instituted in a case not within the statute of 1839, may have been intended as a creditor's bill, so called.

But if so, an execution should have issued upon a judgment at law against the property of the defendants, and been returned unsatisfied in whole or in part; which is not alleged in this bill. And the bill should have contained the averments which the rules require in creditors' bills.

E. C. Seaman, contra.

1. The bill shows that the subscribers to the stock of this banking company did not comply with the conditions of the
455 general banking *act; that is, they did not pay in thirty

Wheeler v. Clinton Canal Bank.

per cent of the stock, and comply with those provisions of the statute which constitute a condition precedent to their becoming a corporation; but, on the contrary, that all their proceedings are based on a fraudulent violation of the statute, which was used merely as a cover or device under which they carried on their fraudulent schemes and practices; they therefore did not become a legal corporation, but constituted a joint stock unincorporated banking company, and are liable individually as copartners in a swindling operation.

2. A court of chancery has jurisdiction of the case, independent of any statute, and can enforce the collection of the plaintiff's claim against the directors and stockholders of the company on the following grounds:

1st. On account of the convenience of enforcing contributions between the several defendants in proportion to the amount of stock held by each. (See the case of *Briggs v. Penniman*, 1 *Hopk. Ch. Rep.*, 300; 8 *Cow. Rep.*, 387; *Mandeville v. Briggs*, 2 *Pet. Rep.*, 482; 8 *Pet. R.*, 256.)

All the defendants are liable in their individual capacity jointly, and therefore the bill is not multifarious. (*Brinkerhoof v. Brown*, 6 *Johns. Ch.*, 139 to 159.) All combined to defraud, although the defendants performed distinct parts in the drama of fraud, all tending to one point. (*Fellows v. Fellows*, 4 *Cow. Rep.*, 682; *Campbell v. McKay*, 7 *Simons*, 564; *Story's Eq. Pl.*, 530 and 539.)

Persons liable on a contingency are proper parties defendants in equity. (*Story's Eq. Pl.*, sections 74, 75, 169, 172, 173, 174, 224, 232.)

In a variety of cases, the plaintiff may or may not join certain persons as parties defendants at his election. (*Story's Eq. Pl.*, sections 169, 221; 2 *Paige*, 279.)

2d. In consequence of the frequent transfers of stock in this case, as well as the frequent change of directors or some of them, and the difficulty or impossibility of showing when the notes or bills of the *bank, on which this suit was com-

Wheeler v. Clinton Canal Bank.

menced, were issued, it would be difficult if not impossible for the plaintiff to determine on whom to fix the liability at law, and his remedy, if any, at law, would therefore be doubtful and difficult, and on that account a court of equity has jurisdiction. (*American Insurance Co. v. Fisk*, 1 Paige, 92; *Weymouth v. Boyer*, 1 Ves., 416.)

3d. The transactions of the defendants are fraudulent, and they used the general banking law merely as a cover for their fraudulent devices and schemes. A court of equity has concurrent jurisdiction with courts of law in matters of fraud. (*Colt v. Wollister*, 2 P. Williams, 156; *Green v. Barrett*, 1 Simons, 37, 45; *Blair v. Agar*, 2 Simons, 289.)

4th. The statute of Michigan of 1839 for the voluntary dissolution of corporations, and for other purposes, applies only to legal corporations, and not to cases of this kind, where the company did not become a legal corporation. That statute also gives a cumulative remedy, and does not take away the usual remedy to which the creditors were entitled in equity previous to the statute. We claim the common remedy in equity independent of the statute. (*Crittenden v. Wilson*, 5 Cow., 165.)

THE CHANCELLOR.—The bill in this cause substantially charges the defendants with having combined under the color merely of the general banking law of this State, for the purpose of defrauding the complainant and other persons who should receive the notes of said banking association. It not only charges that the original stockholders and officers of the institution, but also that the persons severally charged with having become subsequent purchasers of the stock, purchased for the purpose of aiding in such fraud and with the intent and design to deceive and defraud the complainant and all the creditors of said association. It purports to charge them and each of them in their individual capacities as members of a fraudulent copartnership, or association. A variety of questions have been raised upon the different demurrers. It will not be necessary to notice all the points raised at the arguments, as the grounds upon which the bill is sustained, and the

Wheeler v. Clinton Canal Bank.

demurrers overruled, will appear in the opinion. *The 457 complainant in this case seeks to charge the defendants as a voluntary association, who under the pretence and color of the general banking law of this State have conspired to defraud the complainant, and such others as should receive the notes of said association. The fact that another creditor has seen fit to treat them as a corporation, and has filed his bill and obtained the appointment of a receiver of the effects of this corporation, cannot deprive this complainant of his remedy, in this form, if he can establish the truth of the allegations of his bill. The objection that the bill contains a prayer for the appointment of a receiver is not a good cause of demurrer; it may or may not have been necessary, but is not such an objection as can sustain the demurrer. This is not what is termed a creditor's bill; but on the contrary, it seeks to charge the defendants in an original proceeding as members of a fraudulent association or copartnership. The objections, therefore, that the complainant has not in the allegations in his bill, conformed to the rules required in creditors' bills, have no application, from the view I take of the scope and objects of the bill. Another cause of demurrer is that the complainant has an adequate remedy at law, and therefore a court of chancery has not jurisdiction. The frequent transfers of stock and changes of interest, and the extraordinary manner in which the business has been conducted, according to the showing in the bill, would render the complainant's remedy at law both difficult and doubtful; this of itself is sufficient to give this court jurisdiction. (*1 Paige R.*, 92.) Courts of chancery have also concurrent jurisdiction in cases of fraud. The objection of multifariousness, that the several directors and stockholders are made parties, notwithstanding they were connected with this association at different periods, and have distinct rights and liabilities, is the next and principal remaining question. From the manner in which the business was conducted, it seems to me that the course the complainant has pursued was the proper one. The stockholders and directors only, are parties, and it is alleged that they all performed different

Wheeler v. Clinton Canal Bank.

parts in the same drama. A bill may be sustained against different persons relative to matters of the same nature, in which all the defendants were more or less concerned, though not jointly in each act. Should it prove in the event that any of these defendants were not partners in the concern at the time the
458 notes on which the *complainant prosecutes were issued, they may not be liable to contribute to their payment. But if it proves true that this was a fraudulent combination, merely under the pretence of the statute, in which the defendants all participated to defraud the complainant, it is but just that each and all should be held responsible to the creditors who have been defrauded in this way. From the view I have taken of this bill it was not necessary that the receiver should have been made a party. The complainant is entitled to his dividend from whatever may be obtained from the property of this concern in the hands of the receiver, without making him a party, and without a waiver of his rights against the defendants in this form. (b.)

Demurrer overruled.

(b.) See Cook v. Wheeler, *ante*, p. 443, and the cases cited in note (c.) p. 448.

INDEX TO CASES REPORTED.

ACCEPTANCE.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 1, 2; TOWN PLATS, 3, 4.

ACKNOWLEDGMENT.

See MORTGAGE, 3; PLEADINGS, 4.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVIT.

See INJUNCTION, 11; PRACTICE, 7, 13, 14.

AGENT.

See PRINCIPAL AND AGENT.

ALIENATION.

See DEED; WILL.

ALIMONY.

Jurisdiction. A court of chancery has no jurisdiction of a case where the bill is filed for alimony merely. *Peltier v. Peltier*..... 19

AMENDMENT.

See PLEADINGS, 8; PRACTICE, 8 to 11, 37.

INDEX.

ANSWER.

See PLEADINGS.

ASSIGNMENT.

See MORTGAGE, 5; PLEADINGS, 3, 4; SPECIFIC PERFORMANCE, 11.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. *Acceptance.* An assignment for the benefit of creditors, absolute in its terms, and which is accepted by the assignee, dedicates the property absolutely to the purposes of the trust, notwithstanding it is made without the knowledge or concurrence of the creditors. *Shydam v. Dequindra*..... 367
2. By the execution and delivery of the assignment the relation of trustee and *cestui que trust* is constituted at once, without any express assent of the creditors; and it cannot afterwards be revoked except upon the dissent of creditors. *Id.*..... 367
3. *Receiver.* The court in decreeing the execution of the trust under an assignment, under the special circumstances of the case, appointed a receiver for the purpose. *Id.*..... 367

See BANKS AND BANKING, 1, 3, 4, 6; PARTNERSHIP, 1 to 7.

ATTACHMENT FOR CONTEMPT.

1. *Proof of failure to comply with order.* The return of a master charged with the execution of an order of court, showing the failure of a person to appear and submit to an examination as required by the order, is sufficient foundation for a rule to show cause why an attachment for contempt should not issue. *Whipple v. Brown* 436
2. But the affidavit or return of service of the master's summons should show the time and manner of service. Where the affidavit of service was in general terms that the summons was served as required by the rule of court, and the respondent made an affidavit showing that it was served less than a full day before the time for appearance, the service was held insufficient. *Id.* 436
3. Where a notice was to appear before one master, and return was made by another that the defendant did not appear; *held*, not to show any failure of defendant to comply. *Id.*..... 436

ATTORNEY AND COUNSELOR.

Privileged communications. A statement of fact made by an attorney to his client, and which apprises the client of equities in a third party, is not a privileged communication, and may be proved by the attorney. *Washworth v. Lovanger*..... 113

See PLEADINGS, 5; PRACTICE, 22 to 25.

BANKS AND BANKING.

1. *Insolvency of bank, what facts are evidence of.* Where it appeared from the statements in the bill, that a bank commissioner examined into the affairs of the Bank of Brest on the second day of August, 1838, and the specie then on hand was \$9,754.92, and that another examination of the affairs of the bank was made on the eleventh day of the same month, and it then had but \$138.89, and there was no corresponding decrease of liabilities; and about \$44,000 of the issues of the bank were in the hands of agents without sufficient sureties; and that of the assets there were \$8,000 in uncurrent notes; and that \$25,000 of post notes were issued on the fourth day of the same month of August, without being indorsed by a bank commissioner; and the bill charged the bank to be insolvent; and the answer admitted the facts set forth in the bill, but denied the insolvency; it was held that the bank was insolvent within the meaning of the law, and that a proper case was made for the appointment of a receiver to take charge of its effects. *Bank Commissioners v. Bank of Brest*..... 106
2. *Assignment by bank.* A transfer, by way of security, of a portion of the effects of a moneyed corporation, for the purpose of carrying on the concern, is within the powers of the directors; and a corporation which has no particular mode pointed out for closing its concerns may make an assignment on obtaining the assent of the stockholders. *Ib*..... 106
3. *General assignment by bank.* The directors of a moneyed corporation, like that of the Bank of Brest, have no power to make an assignment, without being authorized so to do by the stockholders. *Ib*..... 106
4. *Directors, for what purpose are trustees.* The directors are trustees of the stockholders for the purpose of carrying on the business of the corporation, and not for the purpose of winding it up and destroying its existence. *Ib*.. 106
5. *Statutory provisions for winding up.* The statute prescribes the mode in which the affairs of banking associations, established under the general banking law of this State, shall be wound up, in case of insolvency; and this forms a part of the security to the public, and is one of the conditions upon which they take their chartered powers. *Ib*..... 106
6. *Assignment to evade statute void.* An assignment made by the directors of the Bank of Brest, to a trustee, for the benefit of creditors, with a view to evade the provisions of the statute, was held to be against the policy of the law, and void. *Ib*..... 106
7. *Injunction against bank, what not sufficient cause.* By the act incorporating a bank a previous act was referred to, and in effect made a part thereof, which provided that if any bank did not pay its notes on demand, the charter should not for that cause be dissolved, but it gave the bank sixty days within which to redeem its notes. It contained further provisions that the act should not prevent the issuing of an injunction, and that one might be issued when any bank should refuse to pay its debts. *Held*, that these provisions relative to injunctions did not change the previous law on that subject. *Barnum v. Bank of Pontiac*..... 116
8. The provision that an injunction might be issued on a failure to pay was not imperative, but left it to the sound discretion of the court, upon a proper case being made. *Ib*..... 116
9. Where a bill alleged merely a demand and refusal by the bank to pay its notes, and contained no allegations of any impending mischief, danger or hazard of the rights of complainant, an injunction was refused. *Ib*..... 116

10. *Effect of injunction against a bank.* An injunction against a bank goes to prevent all action whatever, and is rather in the nature of a final injunction which is sometimes granted at the termination of a cause, than the usual injunction to prevent some particular mischief. *Ib.*..... 116
11. *Cause for injunction against bank: Notice.* Except in cases where the bill is filed by a bank commissioner, showing fraud, violation of the charter, or insolvency, notice should be given of an application for an injunction against a bank, and a case should be made out that would warrant the court to wind up the concerns of the bank. *Ib.*..... 116
12. *Insolvent banks, dismissal of suit against.* Where an individual creditor had filed his bill against a moneyed corporation, obtained an injunction and the appointment of a receiver, and the receiver had taken upon himself the trust, and other creditors had filed their claims, it was held that the creditor who had filed his bill, obtained the injunction, and the appointment of a receiver, was not entitled, as a matter of right (upon being paid his demand), to dissolve the injunction, dismiss his bill, and discharge the receiver. *Fay v. Erie & Kalamazoo R. R. Bank.*..... 194
13. There is no doubt that the court has the power, in such case, to dissolve the injunction, discharge the receiver, and permit the party to dismiss his bill, when it is satisfied that the interests of all concerned will be best subserved by permitting the corporation to manage its own concerns. *Ib.*..... 194
14. *Officers of bank, powers of.* Where a note is made payable at a bank, it is within the ordinary scope of the powers of the bank officers to receive other notes as collateral, on the understanding that they should be placed in the bank for collection, and that when a sufficient amount should be collected thereon for the purpose it should satisfy the first note. *Wales v. Bank of Michigan.*..... 306
15. *Injunction against suspended bank.* The rule adopted in this State has been not to grant an injunction in the first instance upon the allegation alone that a bank has stopped payment, but to grant a rule to show cause and require notice to be given to the defendants. If not explained or excused in cases where the banks are not protected from a forfeiture of their charters by reason of a failure, the court would be authorized to grant an injunction and appoint a receiver. But when banks are authorized to suspend specie payments, such refusal is not even *prima facie* evidence of insolvency. *Attorney General v. Bank of Michigan.*..... 316
16. The true construction of the sixth section of the suspension act of April 12, 1841, is that the statements should be made out and transmitted to the Secretary of State on the days specified, or as soon thereafter as the same could be made out and stated. *Ib.*..... 316
17. *General banking law: Enforcing claims against stockholders.* Where by a general law for incorporation of banks, the directors and stockholders are made individually liable for all debts, and an assignee of a demand is proceeding to enforce it against them, it is immaterial whether he paid full value for it, as they are liable for the whole whether he did or not. *Cook v. Wheeler.*..... 443
18. Fraudulent partners are also liable to the assignee for the whole amount of a partnership debt, whether he paid full value or not. *Ib.*..... 443
19. Where, therefore, a bill was filed against parties charged as being directors and stockholders in a bank organized under the general banking law of 1837, or, in the alternative, as being fraudulent partners, the object of the bill being to enforce payment of notes of the bank, it was held, that defendants

INDEX.

463

- were not entitled to file a cross-bill, to compel complainant to disclose when he became owner of the notes, or how much he paid for them; as such discovery would be immaterial to the defense. *Ib.*..... 443
20. *Fraudulent associates assuming to be a corporation.* Where defendants are charged as fraudulent associates, who under the pretence and color of a general incorporation act have combined to defraud complainant, the fact that another creditor has seen fit to treat them as a corporation, and obtained the appointment of a receiver, is no bar to complainant's suit. *Wheeler v. Clinton Canal Bank.*..... 449
21. *Fraud: Creditor's bill.* A bill to enforce a demand thus contracted is not what is called a creditor's bill, and it is not essential that there should have been judgment and execution at law before it can be filed. *Ib.*..... 449

BETTERMENTS.

See JURISDICTION, 8.

BILL.

See PLEADINGS.

BILLS OF PEACE.

1. Bills of peace are only allowed where the complainant has established his right at law; or where the persons who controvert the right are so numerous as to render an issue under the direction of this court indispensable to embrace all the parties concerned, and save a multiplicity of suits. *Lapeer County v. Hart.*..... 157
2. Where sixty-seven suits were brought upon county orders by different plaintiffs before justices of the peace, some of which were tried and judgments rendered for the plaintiffs, and five of them appealed to the circuit court, and the county commissioners claimed to have a valid defense to them all, and filed a bill in equity to enjoin them until the appealed suits could be tried, it was held that no case of equitable jurisdiction was made out, and a preliminary injunction was dissolved. *Ib.*..... 157
3. The fact that there were no funds in the county treasury with which to pay the costs and appeal the remaining suits constitutes no reason for equitable interference. *Ib.*..... 157

CITY OF DETROIT.

See DETROIT CITY.

COMITY.

See INJUNCTION, 8.

COMMISSIONERS OF INTERNAL IMPROVEMENT.

See WAYS, 2.

CONSIDERATION.

1. *Support of parent.* An agreement by a daughter and her husband to support her father during his natural life, is a sufficient consideration for a conveyance of the father's lands to the daughter. *Goff v. Thompson*..... 60
2. After the death of the father, the agreement having been fully performed, the conveyance will not be set aside to give effect to a previous will made by the father, notwithstanding the daughter had attempted, by deed executed by her alone, to reconvey the lands to the father as security for his support. *Ib.*..... 60
3. *Duress.* Where the fears of a timid and ignorant man were practiced upon by threats of a prosecution for slander, and he was thereby induced to assign a mortgage to another, the assignment was held to be without consideration, and a re-assignment was decreed. *Tate v. Whitney*..... 144

See CONTRACTS, 2.

CONSTRUCTION.

See CONTRACTS, 1; STATUTES, 1.

CONTEMPT.

See ATTACHMENT FOR CONTEMPT; PRACTICE, 17.

CONTRACTS.

1. *Cotemporaneous.* Where several papers are executed between the same parties cotemporaneously, and relate to the same subject matter, they are regarded as together constituting one and the same transaction. *Diabrow v. Jones*..... 48
2. *Contract to mislead land board immoral and void.* If two persons, claiming joint possession of land, enter into an agreement that a claim by them shall be presented to the government land board, in the name of one alone, and that when the claim is confirmed to him, he shall convey a part of the land to the other, is immoral as tending to mislead the land board, and therefore, *it seems*, void. *Bernard v. Bougard*..... 130
3. *Parol merged in writing.* It is a general rule that a contract cannot rest partly in writing and partly in parol. Where a contract is reduced to writing, all previous parol agreements relating to the same matter are merged in the written contract. *Street v. Dow*..... 427

See CONSIDERATION; DEED; FRAUD; INSURANCE.

INDEX.

465

CONVEYANCE.

See CONSIDERATION; DEED; INSURANCE; MORTGAGE.

CORPORATIONS.

1. *Corporations, jurisdiction over.* The jurisdiction of this court over corporate bodies, for the purpose of restraining their operations, or of winding up their concerns, is based upon and controlled by the statutes of the State. It has no such jurisdiction at common law, or under its general equity powers, and it will not interfere except where the case is fairly brought within the scope and object of the statute conferring this special jurisdiction. *Attorney General v. Bank of Michigan*..... 315
2. The provisions of the act of June 21, 1837, and the act of April 12, 1841, in regard to banks and incorporations, commented upon and explained. *Ib.*.. 315
3. *Forfeiture of corporate rights.* If a corporation has forfeited its rights by misfeasance, or non-feasance, such forfeiture must be shown by the pleadings; it is not to be presumed; the legal presumption is otherwise. *Ib.*.... 315
4. The fact that a bank not protected by statute authorizing a suspension of specie payments, has stopped payment, is not of itself conclusive evidence of its inability to pay its debts, but is *prima facie* evidence of inability or insolvency. *Ib.*..... 315
5. *Surrender of corporate rights, what is.* If a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. *Bank Commissioners v. Bank of Brest*..... 106
6. *Dissolution of failing corporations.* The primary object of proceeding in chancery against failing corporations is not for the purpose of dissolving the corporation, but to protect the assets for the benefit of creditors. The power to decree a dissolution of the corporation is merely incidental. *Fay v. Erie & Kalamazoo R. R. Bank* 194
7. *Discharging receiver.* It is the duty of the court to look into the condition of the corporation before it will discharge the receiver, and make such order, either absolute or conditional, as the case may require. *Ib.*..... 194

See BANKS AND BANKING.

COSTS.

See MORTGAGE, 11.

COUNTY ORDERS.

See BILLS OF PEACE.

COVENANT.

- Several.* Where the covenants and conditions of bonds and other deeds are several, they may be good in part, and void as to the residue. *Kirby v. Ingersoll*..... 173

CREDITORS' BILLS.

1. *Jurisdiction.* The jurisdiction of the court of chancery to apply the property of the defendant, which is beyond the reach of an execution at law, to the satisfaction of the debt due to the judgment debtor, proceeds upon the ground that the remedy at law is exhausted. *Steward v. Stevens*, 169; *Thayer v. Swift*..... 430
2. The remedy at law is not exhausted until an execution has been issued and returned unsatisfied. And for this purpose it cannot be returned until the return day. *Thayer v. Swift*..... 430
3. The remedy by creditor's bill is a harsh remedy, which will not be afforded unless the creditor shows a strict and rigid compliance with the rules and forms of law. *Ib.*..... 430
4. *Return of execution.* For the purpose of a creditor's bill, the execution cannot be returned until the return day. *Steward v. Stevens*, 169. Even though the bill is not filed until after the return day. *Stafford v. Hulbert*, 435
5. A return that the sheriff has property in his hands for want of bidders, is insufficient. *Eldred v. Camp*..... 163
6. *Bill, what to state.* A creditor's bill must contain the averments required by the 109th rule (rule 102 of 1858), and those averments must be sworn to. *Clark v. Davis*..... 227
7. *Bill with double aspect.* A bill may be filed both to reach mere equitable interests and in aid of execution at law; and such a bill is not multifarious. *Ib.*..... 227
8. *Waiver of right to file.* The right to file a creditor's bill having once attached by the return of an execution unsatisfied, the party does not lose his right to file the same by the issuing of a new execution. *Ib.*..... 227
9. *Bill in aid of execution.* Where a lien has been acquired by levy of execution, or where there is an outstanding execution in the hands of an officer, and a fraudulent obstruction is interposed to prevent its being levied, a bill may be sustained for a discovery, and to remove such obstruction. *Thayer v. Swift*..... 430

See BANKS AND BANKING.

DAMAGES.

See JURISDICTION, 7, 8.

INDEX.

467

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CREDITORS' BILLS.

DECREE.

See PRACTICE, 32 to 37.

DEDICATION.

See TOWN PLATS; WAYS.

DEED.

1. *Fraudulent in part is void.* The better opinion seems to be, that even at common law a deed fraudulent in part is altogether void. *Kirby v. Ingersoll*. 172
2. *Illegal conveyance void.* The construction to be put upon a deed conveying property illegally is, that the clause which so conveys it is void equally, whether the illegality be by statute or at common law. This is the rule, except in cases where the statute declares the whole instrument void. *Ib.* 172
3. *Deeds void in part.* One good trust inserted in an illegal instrument of assignment cannot make that instrument a valid one. *Ib.*..... 172
4. A grantee, who voluntarily becomes a party to a deed which is fraudulent in part, forfeits his right to claim benefit from another part which would have been good. *Ib.*..... 172

See CONSIDERATION; INSURANCE; MORTGAGE; RECORDING LAWS.

DEFAULT.

See PRACTICE, 13 to 20.

DEMURRER.

See PLEADINGS.

DEPOSIT IN COURT.

See PRACTICE, 31.

DEPOSITIONS.

See PRACTICE, 27 to 29.

INDEX.

DETROIT CITY.

Corporate powers of. The corporation of the city of Detroit has no power except that which is conferred by the act of incorporation or other acts specially relating thereto. *Cooper v. Alden*..... 13

See **WAYS**.

DIRECTORS OF BANKS.

See **BANKS AND BANKING**, 3, 4, 6, 13.

DISCOVERY.

In aid of defense at law. Equity may compel a discovery in aid of a defense at law, and may stay the proceedings at law until an answer to the bill of discovery has been obtained. *Wright v. King*..... 12

ESTATES OF DECEASED PERSONS.

Probate sale: Judge interested. Where a sale of real estate was ordered by a judge of probate, and it appeared that he himself became interested in the purchase, the sale was set aside, and a resale ordered to be made under the direction of the court. *Walton v. Torrey*..... 259

See **EXECUTORS AND ADMINISTRATORS**; **PARTNERSHIP**, 11, 12.

ESTOPPEL.

See **PLEADINGS**, 29.

EVIDENCE.

See **MORTGAGE**, 1; **PLEADINGS**, 18; **PRACTICE**, 27 to 29; **TAX TITLES**.

EXECUTION.

See **CREDITORS' BILLS**.

EXECUTORS AND ADMINISTRATORS.

1. *Administrator's sale, when should be adjourned.* When the day appointed for an administrator's sale is rainy and inclement, and but few persons

- appear and bid, and the bids do not exceed half the value of the property, it is the duty of the administrator to adjourn the sale. *Beaubien v. Poupard*, 206
2. *Administrator's sale: Administrator cannot bid.* A party cannot become the purchaser, either directly or indirectly, at a sale made by himself as administrator. *Ib.*..... 206
3. Where the administrator procured his brother-in-law to become the purchaser, and immediately afterwards took a conveyance of the premises so purchased to himself, the court of chancery, on bill filed by the heirs, set aside the sale, ordered the deed delivered up to be canceled, and directed a resale. *Ib.*..... 206

See ESTATES OF DECEASED PERSONS; INJUNCTION, 9.

FORECLOSURE OF MORTGAGE.

See MORTGAGE.

FORFEITURE.

See BANKS AND BANKING; CORPORATIONS.

FORMER SUIT PENDING.

See PLEADINGS, 12.

FRAUD.

1. *Meaning of.* By the term *fraud*, the LEGAL intent and effect of the acts complained of is meant. *Kirby v. Ingersoll*..... 172
2. The law has a standard for measuring the intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the party denies all intention of committing a fraud. *Ib.*..... 172
3. *Setting aside contract for.* A stock of goods was exchanged by complainant for lands, which defendants represented to be pine lands, having a certain large quantity of pine timber standing thereon. Complainant had never seen the land, and relied upon these representations. It turned out that there was pine on but about one-fourth of the land, and on that only about half the quantity represented. The court decreed the contract rescinded, that the unsold portion of the goods be re-delivered to complainant, and that he be paid for those sold, and have a lien on the land as security until the payment was made. *Jones v. Wing*..... 301
4. *False representations: Scienter.* Where the representations on which a party relies are untrue, it is immaterial whether the party making them

- knows them to be so or not; the effect upon him being the same in either case. *Ib*..... 301
5. *Remedy at law.* Where the transactions stated in the bill, by which certain notes were obtained, presented a case of fraud, although, from the case made, it was doubtful whether the complainant could defend successfully the full amount of the notes, and a general demurrer was interposed, the court refused to sustain the demurrer, and required the defendant to answer. *Ankrim v. Woodworth*..... 355
6. In cases of fraud where it is doubtful whether the defense would be good at law, the court of chancery will entertain jurisdiction. *Ib*..... 355
7. *Laches in applying for relief.* A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating it when discovered, and consistent in his notice to the opposite party of the use he intends to make of it. *Distrow v. Jones*..... 102
8. *Same: The principle applied.* Where the complainant had rested for several months after he had knowledge of the fraud complained of, and until the condition of the property had changed, before he took any steps to rescind the contract, this court refused to interfere, and left the complainant to his remedy at law. *Ib*..... 102
- See BANKS AND BANKING, 17, 21; CONSIDERATION; LIMITATION OF TIME AND LACHES.

FRAUDS, STATUTE OF.

See SPECIFIC PERFORMANCE; TRUSTS.

GENERAL BANKING LAW.

See BANKS AND BANKING.

GOVERNOR AND JUDGES.

See CONTRACTS, 2; WAYS.

GUARDIAN AND WARD.

Power to sell mortgage. The guardian of a minor has the right to collect and receive money due to his ward on bond and mortgage, or to sell and assign the bond and mortgage, in the exercise of his discretion as guardian. *Liv-
ington v. Jones*..... 165

See ESTATES OF DECEASED PERSONS.

HUSBAND AND WIFE.

1. *Deed of married woman.* A deed executed by a married woman without her husband joining with her is void. *Goff v. Thompson*..... 60
2. *Bill by married woman.* A bill by a married woman against her husband must be filed by *prochein ami*. *Peltier v. Peltier* 19

See ALIMONY.

ILLEGAL INSTRUMENTS.

See BANKS AND BANKING, 6; CONTRACTS, 2; DEEDS, 1.

IMPLIED TRUSTS.

See TRUSTS.

INFANT.

See GUARDIAN AND WARD.

INJUNCTION.

1. *Against public officers.* Equity has undoubted jurisdiction to interfere by injunction where public officers are proceeding illegally and improperly, under a claim of right, to do any act to the injury of individual rights. *Cooper v. Alden*..... 72
2. The ground on which equity interferes to restrain public officers who are acting illegally, is to prevent great and irreparable mischief. It will not interfere if the injury is slight or doubtful. *Brown v. Gardner*..... 291
3. Where a bill was filed and preliminary injunction obtained to restrain commissioners of highways from laying out a highway through the orchard and garden of complainant in violation of the statute, and it appeared that the road was actually opened before defendants had notice of the injunction, the bill was dismissed. *Id.*..... 291
4. *To prevent improper appropriation of street.* Where land is dedicated to a particular purpose, and the municipal authorities undertake to appropriate it to an entirely different one, they may be restrained by injunction, on the application of an adjoining lot owner, from so doing. *Cooper v. Alden*.... 72
5. *Injunction ex parte.* The ground and the only ground on which injunctions are granted against persons in possession of personal property and ostensibly the rightful owners, upon an *ex parte* application, is the protection of the fund or property, when it is shown that without such interposition of the court there is danger that it may be lost to the complainant if he succeeds in establishing his title. *Thayer v. Swift*..... 490

2. But it will have jurisdiction if the bill prays relief to which complainant is entitled, but which cannot be had at law. *Rowland v. Doty*..... 3
 3. If the remedy at law is difficult or doubtful, equity will entertain jurisdiction. *Wheeler v. Clinton Canal Bank*..... 449
 4. *Remedy at law: Laches.* If he has a defense at law of which he is aware, but neglects to make it, or to apply for a discovery in aid thereof when necessary, he cannot, after judgment against him at law, have relief in equity. *Wright v. King* 12
 5. *Titles to land.* Chancery is not the appropriate tribunal for the trial of titles to land. *Devaux v. City of Detroit*..... 98
 6. *Jurisdiction for one purpose retained for another.* The court, being satisfied that defendants had acted in good faith, refused, on denying the principal relief, to retain the bill for the purpose of giving damages to complainant. *Brown v. Gardner*..... 291
 7. Though specific performance is refused on a bill filed for that purpose, the court, in a proper case, may retain the bill for the purpose of adjusting accounts between the parties. *Hawley v. Sheldon*..... 420
 8. Bill retained for the purposes of an accounting as to the value of improvements where the complainant had been in possession, and made improvements which defendants claimed were to be applied on rents. *Ib*..... 420
 9. *Fraud: Laches in applying for relief.* A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating it, and consistent in his notice as to the use he intends to make of it. *Street v. Dow*, 427
 10. *Fraud: Remedy at law.* Courts of equity have concurrent jurisdiction with courts of law where fraud is charged. *Wheeler v. Clinton Canal Bank*.... 449
- See ALIMONY; BILLS OF PEACE; CORPORATIONS; CREDITORS' BILLS;
FRAUD; JUDGMENT; PARTITION; QUIETING TITLES.

LACHES.

See LIMITATION OF TIME AND LACHES.

LANDLORD AND TENANT.

See NOTICE.

LAND TITLES.

See JURISDICTION, 5; QUIETING TITLES.

LIEN.

1. *Vendor's Lien.* The vendor of real estate has an equitable lien upon the same for the purchase money, where there is no security for its payment taken. *Carroll v. Van Rensselaer*..... 225

2. *Vendee's lien.* A vendee who has paid the purchase money, has a lien against the vendor analogous to that of a vendor against a vendee who has not paid the purchase money. *Payne v. Atterbury*..... 414

LIMITATION OF TIME AND LACHES.

1. *Laches a bar to relief.* Where the action was not commenced for upwards of twenty years after the right of action accrued, and no disability or excuse for the delay was pretended, or new discovery of facts suggested, and both the person charged with committing the fraud and his grantee were dead, the court refused to sustain the suit, by reason of the lapse of time, and held that the case could not be aided by proof of facts which were not put in issue by the pleadings. *McLean v. Barton*..... 279
2. A court of equity will lend its aid to detect and redress a fraud, notwithstanding the lapse of time; but when the fraud is discovered the parties must act upon that discovery within a reasonable time. The party seeking redress should not wait until all those who were cognizant of the transaction have paid the debt of nature, and until no one is left to deny or explain the allegations, unless satisfactory excuse can be given for the delay. *Id.*..... 279
3. A party who has a defense at law, of which he is advised, and neglects to make it, comes too late to this court, to ask to be relieved against the judgment. *Barrows v. Doty*..... 1
4. If a party has a defense at law, of which he is advised before the trial, and neglects to make it, or to apply to the court of chancery for a discovery, if necessary to his defense, in aid of the trial at law, he is precluded, and cannot afterwards have relief in this court. *Wright v. King*..... 12

See FRAUD; JURISDICTION, 4, 9; LIMITATIONS, STATUTE OF.

LIMITATIONS, STATUTE OF.

1. *Repeal of limitation acts.* Whether by section three of the repealing act contained in the Revised Statutes of 1838 it was intended to continue in force the provisions of the acts of limitation repealed by that act, where the time had "begun to run," or whether the time prescribed in the Revised Statutes was intended as the period at the expiration of which the suits should be barred, *quære.* *McLean v. Barton*..... 279
2. *Lapse of time, how taken advantage of.* The statutes of limitation and lapse of time may be taken advantage of on demurrer. *Id.*..... 279

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER IN CHANCERY.

See ATTACHMENT FOR CONTEMPT; PRACTICE, 71.

MORTGAGE.

1. *By deed absolute in form: Parol evidence to show intent.* A deed absolute in form may be proved by parol to have been intended by the parties to operate only as a mortgage for money loaned at its date; and such proof will entitle the grantor to redeem. *Wadsworth v. Loranger*..... 113
2. *Defective, purchase subject to.* One who buys land and receives a conveyance subject to a mortgage thereon, cannot afterwards contest the validity of the mortgage on the ground of defect in the formalities of execution. *Disbrow v. Jones*..... 48
3. *Acknowledgment no part of deed.* The acknowledgment of an assignment of mortgage is no part of the instrument of assignment. *Livingstone v. Jones* 165
4. *Release of mortgage by quit-claim deed.* Where the holder of a mortgage executes a quit-claim deed of the mortgaged premises to one who has received a deed thereof under an agreement that he shall pay the mortgage, the effect is to discharge the lien of the mortgage. *Jerome v. Seymour*.... 357
5. A subsequent assignment of the mortgage to a third person will not entitle the latter to enforce it. *Id.*..... 357
6. *Foreclosure for one installment.* Equity will not interfere to prevent the mortgagee selling, under the power of sale, the whole of the mortgaged premises for a single installment, when it appears that they cannot be sold in parcels without injury to the whole. *Disbrow v. Jones*..... 48
7. *Set-off by mortgagor of claim owing by mortgagee.* Where land which was under lease for a term was sold, and a mortgage taken back for the purchase price, and it was agreed between the parties that during the leasehold term, the mortgagee should pay to the mortgagors the interest on the purchase price: *held*, that on a foreclosure of the mortgage the amount of this interest should be deducted from the amount due on the mortgage, and a sale be decreed for the balance only. *Jones v. Disbrow* .. 102
8. *Irregular foreclosure, waiver of.* Where, in a foreclosure of a mortgage, by advertisement under the statute, a mistake occurs, which renders the proceedings irregular and voidable, the mortgagee has a right to waive those proceedings, and commence *de novo*, either by advertisement under the statute, or by availing himself of the right he had in the first instance to seek his remedy in this court. *Atwater v. Kinman*..... 243
9. *Setting aside foreclosure at law.* A foreclosure under the power of sale, if made for an excessive amount, may be set aside before the proceedings under it are perfected, on a bill filed by the debtor for leave to redeem on paying the amount due. *Schwarz v. Sears*..... 440
10. *Redemption against subsequent purchaser.* Where the grantee in such a deed sells and conveys to one who has full notice of all the facts, such second grantee will take no greater interest than his grantor had in the premises, and he will hold them subject to be redeemed on payment of the amount due on the mortgage. *Wadsworth v. Loranger*..... 113

INDEX.

477

11. *Costs on redemption.* Where one purchases lands with knowledge that his grantor holds it in security for a loan, and refuses to receive payment of the loan when tendered, and puts the party entitled to redeem to the expense of a suit for the purpose, he will be compelled to pay costs. *Ib.*..... 113

See PARTIES; PLEADINGS, 3, 4, 7; RECORDING LAWS.

MULTIFARIOUSNESS.

Where parties are charged as fraudulent associates under pretence of a corporation, the bill is not rendered multifarious by the fact that the defendants were connected with the association at different periods and in different capacities, and may have different liabilities. *Wheeler v. Clinton Canal Bank.*..... 449

MULTIPLICITY OF SUITS.

See BILLS OF PEACE.

MUNICIPAL CORPORATIONS.

See DETROIT CITY; TOWN PLATS.

NE EXEAT.

See PRACTICE, 1.

NOTICE.

By possession of land. The possession of a tenant is notice to a purchaser of the tenant's actual interest in the premises. *Disbrow v. Jones.*..... 48

See ATTACHMENT FOR CONTEMPT; BANKS AND BANKING, 11; RECORDING LAWS.

OFFICERS.

See BANKS AND BANKING, 3, 4, 14; INJUNCTION, 1 to 4.

PARTIES.

1. *Foreclosure bill: Parties.* A trustee, holding a mortgage as such, need not make his *cestuis que trust* parties to a bill to foreclose it. *Sill v. Ketchum*, 428

2. *Cestuis que trust, when not necessary parties.* *Cestuis que trust* are not necessary parties when the only object of the suit is to reduce the property into possession. *Id.*..... 423
3. Where the object of the bill is merely to collect money, it is not necessary for the complainant to make a *cestui que trust* a party; though it would be otherwise if the existence or enjoyment of the trust property were to be affected. *Cook v. Wheeler*..... 448
4. *Bill against fraudulent associates: Parties.* In proceeding against parties as fraudulent associates, it is not necessary to join as defendant a receiver previously appointed in a suit against them as a corporation. *Wheeler v. Clinton Canal Bank* 449

See TRUSTS, 4.

PARTITION.

- Jurisdiction.* Equity has jurisdiction to make partition between joint owners of lands, notwithstanding a remedy at law is given by statute. *Thayer v. Lane*..... 247

PARTNERSHIP.

1. *Partners, implied power of.* One partner may bind his co-partner in all matters within the scope of the co-partnership; the implied authority of one partner to bind his co-partner is generally limited to such acts as are in their nature essential to the general objects of the co-partnership. *Kirby v. Ingersoll*..... 172
2. *Partners, general assignment by one.* One partner cannot make a general assignment of the partnership effects to a trustee for the benefit of the creditors of the firm, without the knowledge or consent of his co-partner, when he is on the spot, and might have been consulted. *Id.*..... 172
3. There is no implied authority resulting from the nature of the contract of co-partnership, that will authorize one partner to make a general assignment of the partnership effects, without the knowledge or consent of his co-partner. *Id.*..... 172
4. *Partners, implied power of.* The authority impliedly vested by each partner in the other is for the purpose of carrying on the concern, and not for the purpose of breaking it up and destroying it. *Id.* ... 172
5. One partner does not, by any implication, confer a power upon his co-partner of divesting him of all interest in, or authority over, the concern. *Id.*..... 172
6. One partner may transfer a portion of the assets for the purpose of paying or securing debts, or to raise means to carry on the concern; but the power of divesting entirely one partner of his interest, appointing a trustee for both, and breaking up the concern, is not one of the powers either contemplated or implied by the contract of co-partnership. *Id.*..... 172
7. *Partners, general assignment by one.* The principle upon which general assignments by one partner have been declared void is, that one partner has no authority to make a general assignment of the partnership effects in fraud of the rights of his co-partner to participate in the distribution of the partnership effects among the creditors. *Id.*..... 172

8. *Equities of individual and partnership creditors.* As between *bona fide* creditors of a previous firm and the separate creditors of a partner who continued the business and was the sole visible owner of the property employed in trade, and where the separate creditors had given credit, relying on the property employed in trade for payment, such creditors should be preferred to the creditors of the previous firm. *Topliff v. Vail*.. 340
9. The creditors of a partnership have a right to payment out of the partnership effects in preference to the creditors of an individual partner. *Ib*..... 340
10. In the absence of any agreement to the contrary, it is fair to presume that a retiring partner does not intend that the partnership property shall be used for the individual benefit of a partner who continues the business, leaving the debts of the firm unpaid; and this was held to be the presumption where the retiring partner transferred the partnership effects to a partner continuing the business, who agreed to pay the partnership debts and gave bond to that effect. *Ib*..... 340
11. *Right of survivor to possession of assets: Receiver.* A surviving partner having the legal right to the possession of the partnership property, the court will not deprive him of that right, unless upon proof of mismanagement or danger to the partnership effects. *Connor v. Allen*..... 371
12. *Continuance of partnership business after the death of one: Rights of representatives of deceased partner.* Where one of several partners dies and the business of the co-partnership is carried on by the surviving partners without the assent of the representatives, they have, as a general rule, their election to demand interest on the amount of the share of the deceased, or to take a share of the profits; but where the interest of the deceased partner had become vested in one of the surviving partners, who consented to the continuance of the co-partnership, it was held the rule did not apply, and his only right was to share as partner. *Millerd v. Ramsdell*..... 373

See BANKS AND BANKING, 18, 19.

PATENT.

- Settling equities under government grant.* After a confirmation of a claim to land by the board of land commissioners under an act of Congress, and after patent issued, if competent at all for this court to go behind the patent to settle conflicting claims, it should only be done on the clearest and most irrefragable proofs. *Bernard v. Bougard*..... 130

PAYMENT.

See MORTGAGE, 4, 5; SPECIFIC PERFORMANCE; TAX TITLES.

PEACE, BILLS OF.

See BILLS OF PEACE.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in the context of public administration and financial management.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for standardized procedures and the use of modern technology to ensure the reliability and validity of the information gathered.

3. The third part of the document focuses on the interpretation and presentation of the data. It discusses the importance of clear and concise reporting, as well as the use of visual aids such as charts and graphs to facilitate understanding of the results.

4. The fourth part of the document addresses the challenges and limitations of the research process. It acknowledges that there are always uncertainties and potential biases in any study, and it provides strategies to minimize these risks and maximize the quality of the findings.

5. The fifth part of the document concludes with a summary of the key findings and a final statement on the overall significance of the research. It reiterates the importance of ongoing monitoring and evaluation to ensure that the information remains relevant and useful over time.

[illegible]

- objects of the former suit, and the relief prayed for. *Bank of Michigan v. Williams*..... 219
13. *Plea and answer.* A defendant may plead to one part of the bill, and answer to another part; but these defenses must clearly refer to separate and distinct parts of the bill. *Clark v. Saginaw City Bank*..... 240
14. When the answer and plea are to the same parts of the bill, the answer overrules the plea. *Id.*..... 240
15. *Plea, requisites of: Answer in support of.* A plea of a stated account must aver the accounts settled all the dealings between the parties; that the accounts were *just* and *fair*, and due; and these averments must be supported by an answer to the same effect. *Schwarz v. Wendell*..... 395
16. A plea of a release, unsupported by an answer, is insufficient. *Id.*..... 396

IV. ANSWER.

17. *Denials by answer, how made.* Where an allegation is made in the bill with divers circumstances, the defendant should not by his answer deny the allegation literally as laid in the bill, but should answer the point of substance positively and certainly. *Jones v. Wing*..... 301
18. *Answer, when responsive to bill.* Complainant, by his bill, averred his right to certain shares in a partnership, purchased by him of the heirs of a former partner. The answer of defendant set up an agreement by which these shares were to be purchased by complainant for himself and defendant jointly. *Held*, that as to this agreement the answer was not to be regarded as directly responsive to the bill, and, therefore, the agreement was not proved by it. *Miller v. Ramsdell*..... 373
19. *Answer: Impeaching deed.* An answer which admits a deed set out in the bill does not sufficiently impeach it by denying its validity in general terms: It should state the facts which are supposed to render the deed invalid, so that the court may pass upon them. *Payne v. Atterbury*..... 414
20. At law a party is estopped from disputing his deed; and if he would impeach it in equity he must show in what his equity consists. *Id.*..... 414

V. SUPPLEMENTAL BILL.

21. *What may embrace.* If material facts have occurred subsequent to the commencement of the suit the court will give the complainant leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original by way of amendment; and this is especially proper where the matter which occurred prior is necessary to the proper elucidation of that which occurred subsequent to the filing of the original bill. *Graves v. Niles*..... 332

POSSESSION OF LANDS.

See NOTICE; QUIETING TITLES.

PRACTICE.

I. FILING BILL AND PROCESS.

1. A subpoena is the first process; it is irregular to have injunction and *ne exeat* issued and served before the issue of subpoena. *Peltier v. Peltier*..... 19

2. *Subpœna, service of.* The service of a subpœna on a defendant out of the State is irregular. *Pratt v. Bank of Windsor*..... 254

II. AMENDMENT OF PLEADINGS.

3. *Amended bill: Application for leave to file.* It is not a matter of course to allow the filing of an amended bill after the cause has been put at issue and testimony taken. A special application should be made to the court, with a full statement of the facts proposed to be incorporated in the amended bill, so that the court can judge of the propriety of giving leave. *Hammond v. Place*..... 438
4. *Amendment of Plea.* In an application to amend the defendant's pleading, the proposed amendments should be set out. *Freeman v. Michigan State Bank*..... 311
5. A plea may be allowed to be amended for the purpose of placing before the court an additional fact unknown to the defendant when the plea was filed, and consistent with the defense then made. But it will not be permitted for the purpose of setting up a fact or state of facts inconsistent with the original defense. *Ib.*..... 311
6. *Amendments to answer, how made.* Where leave is given to amend an answer, a new answer, with the amendments added, must be made, filed, and copy served, or the original answer withdrawn by leave of the court, and the amendments added; or the amendments must refer to the portions of the answer on file, intended to be amended, and specifying their nature and application. *Mason v. Detroit City Bank*..... 222
7. Amendments in the form of affidavits, without referring to the answer, are irregular, and a motion to dissolve an injunction will not be heard upon them. *Ib.*..... 222
8. *Supplemental answer, leave to file when allowed.* An application to file a supplemental or amended answer is seldom granted, and never without the utmost caution, and when a just and necessary case is clearly made out, and it is then generally confined to a clear case of mistake, as to matter of fact, and as to that only; and the court is still more cautious in granting such an application after a considerable lapse of time from the filing of the bill or original answer in the case. *Graves v. Niles*..... 332
9. Where a motion was made to file a supplemental or amended answer in which it was proposed to take entirely new ground, and change entirely the character of the defense, and this not upon the ground of any actual mistake in a matter of fact, or upon any discovery of new facts, but upon the ground that the defendant did not mean to be understood to state as he had stated in his answer, the court denied the motion. *Ib.*..... 332
10. But where there was doubt in regard to the proper application of certain moneys admitted to have been received by the defendant, and the answer was obscure, and there was a possibility that great injustice might be done to the defendant, the court granted an order with reluctance, permitting a separate supplemental answer to be filed, as to this particular, and explaining this ambiguity. *Ib.*..... 332
11. Where a defendant had leave to file a supplemental answer to explain certain ambiguities in his original answer, and he incorporated other matters of defense in his supplemental answer, on motion of the complainant the supplemental answer was ordered to be taken off the files. *Ib.*..... 332

III. DEFAULT, AND OPENING THE SAME.

13. *Setting aside default.* A regular order to take the bill as confessed will not be set aside upon a simple affidavit of merits, although an excuse is given for the default. *Stockton v. Williams*..... 241
14. In such case, the defendant must either produce the sworn answer which he proposes to put in, or must in his petition or affidavit state the nature of his defense, and his belief in the truth of the matters constituting such defense. *Ib*..... 241
15. *Setting aside pro confesso for answer.* The general rule is that when a defendant, by whom the bill has been taken *pro confesso*, presents an answer which shows a defense, and there is an excuse shown for the default, the court will permit him to file the answer on terms. *Smith v. Saginaw City Bank*..... 426
16. The inclination of the court is always to permit an answer to be filed if it discloses a defense, unless there has been intentional delay. *Ib*..... 426
17. A defendant in contempt cannot move to set aside proceedings; but where there is merely a failure on his part to comply with the provisions of an interlocutory order he may move to discharge the order for irregularity. *Peltier v. Peltier*..... 19
18. *Motion to open default: Affidavit of merits.* On motion to open a default, the affidavit of merits should be made by the defendant himself, or, if made by counsel, a sufficient reason should be shown for its not being made by the party. *Bank of Michigan v. Williams*..... 219
19. A decree by default may be set aside, on motion, without petition, where the facts upon which the motion is based appear by the record. *Graham v. Elmore*..... 265
20. *Waiver of default.* A defendant who had defaulted the complainant for failure to serve a copy of the bill, afterwards filed his answer and moved to dissolve an injunction. *Held*, a waiver of the default. *Higgins v. Carpenter*, 256

IV. SOLICITORS.

22. *Signature by one who is not.* Where a solicitor has appeared in a cause, and a demurrer is filed, signed by solicitors who have not appeared, the demurrer may be treated as without signature and as a nullity. *Graham v. Elmore* 265
23. But where the demurrer in such case was treated as a nullity by the complainants, and a default was entered for want of an answer, and it appeared that the signature of the wrong solicitors was put to the demurrer by mistake, and that injustice would be done if the defendant should not be permitted to answer, the default was set aside on terms. *Ib*..... 265
24. *Motion by one who is not.* It is no objection to an order that it purports to be made on the application of one who is not the solicitor in the cause. It is not necessary that an order should show on whose motion it was made. *Ib*. 265
25. *Rule by consent: Vacating same.* A rule entered by consent will not be vacated unless fraud or misrepresentation is made to appear. *Hammond v. Place*..... 438

V. TAKING DEPOSITIONS.

27. *Agent of party acting in absence of commissioner.* Where the agent or attorney of the complainant examined witnesses and wrote their depositions, and the commissioner before whom they were taken was absent from the room

- several times during the examination, and the defendant did not appear and cross-examine the witnesses, the proceedings were held to be irregular, and the depositions were suppressed. *Burtch v. Hogge*..... 31
28. *Irregularities* or unfairness in taking depositions will, it seems, be taken notice of by courts of equity in any stage of the proceedings in the cause before hearing. *Ib.*..... 31
29. *Exhibits at the hearing.* Where the assignee of a mortgage files a bill to foreclose, setting forth the mortgage and assignment, he may, upon the notice required by the §2d rule to the opposite party, have an order to prove the assignment as an exhibit at the hearing under the provisions of rule 56. *Jerome v. Seymour*..... 255

VI. DEPOSIT IN COURT.

31. *When dispensed with.* Where a party comes to have a foreclosure set aside and for leave to redeem, he must bring into court the amount admitted to be due. The deposit will only be dispensed with where there is uncertainty as to the amount due. *Schwarz v. Sears*..... 440

VII. DECREE.

32. *Motion for decree.* Applications for final decree must be made at a general term, even though they be based on a default. *Higgins v. Carpenter*..... 256
33. *Decree: Cause cannot be severed.* Where there are joint defendants the complainant cannot, upon a *pro confesso* obtained against one, before the cause is at issue or in readiness for hearing against the other, enter a final decree and issue execution thereon against the party against whom the bill has been taken as confessed, and leave the cause to proceed against the other defendant. *Graham v. Elmore*..... 265
34. A final decree, or an interlocutory decree, which, in a great measure, decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the court. *Ib.*..... 265
35. This court will not adjudge upon a part of the case; it will not make a final decree until the case is properly presented in such form as will enable the court to make a final disposition of the case, and do justice to all the parties. *Ib.*..... 265
36. Where a cause is in readiness for hearing against one defendant, and there is another defendant as to whom the cause is not in readiness, the defendant who has appeared and answered cannot notice the cause for hearing, but must move to dismiss the bill for want of prosecution if the complainant fails to expedite it. *Ib.*..... 265
37. *Amending decree.* The court of chancery has the power to direct the alteration or correction of a decree after it has been entered, either upon motion or petition, where there is evidently a mistake or clerical error. *Bates v. Garrison*..... 221

See ATTACHMENT FOR CONTEMPT; CREDITORS' BILLS; DISCOVERY;
HUSBAND AND WIFE; 2; INJUNCTION; MULTIFARIOUSNESS; PARTIES;
RECEIVER.

PRINCIPAL AND AGENT.

Agency disavowed. Where parties assumed to be agents for a bank in settling a demand, and procured from the bank an assignment of prop-

INDEX.

485

erty in compromise, and the bank denied their authority to make the compromise, whereupon the debtor made a second assignment of the property to complainants, *held*, that complainants might maintain a bill in equity to restrain the assumed agents from collecting and disposing of the property. *Pratt v. Campbell* 238

PROBATE SALES.

See ESTATES OF DECEASED PERSONS.

PUBLIC POLICY.

See CONTRACTS, 2.

QUIETING TITLES.

Under the code of 1833 the court of chancery had jurisdiction to quiet the title of the legal owner of land in possession of the same, as against any other person setting up a claim thereto. *Rowland v. Doty*..... 3

RECEIVER.

1. *When one will be appointed.* Where complainant by his bill shows a legal title to lands in possession of the defendant, and from the answer of defendant a strong presumption arises of title in complainant, the court will grant a receiver. *Payne v. Atterbury*..... 414
2. This is especially the case when there are large encumbrances on the lands, and no part of the rents and profits is applied to keep down the interest, and defendant is irresponsible, and is holding over against his own deed. *Ib.*..... 414
3. Affidavits are not admissible to contradict the answer on motion for the appointment of receiver. *Connor v. Allen*..... 371

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3; PARTNERSHIP, 11;
TRUSTS.

RECORDING LAWS.

1. *Priority as between grantees.* Where a party claims priority under or by virtue of the statute regulating the registry of deeds and mortgages, he

- must show a compliance with its provisions in order to entitle him to such priority. *Thompson v. Mack*..... 150
2. *Mortgage by deed absolute in form, record of.* Under the code of 1833, where a deed absolute in form was shown by contemporaneous writing to be only a mortgage, it should have been recorded as a mortgage; and if recorded as a deed, the record would not give it priority over a prior unrecorded mortgage. *Ib*..... 150
3. *Once a mortgage always a mortgage.* Where a deed absolute in form was given to secure a debt, and the grantee at the time gave back an agreement to reconvey when the debt should be paid, but this agreement was not recorded, and the deed was recorded as a deed and not—as the statute required—as a mortgage; and the grantor, to obtain further credit, afterwards gave up the agreement to reconvey, and the grantee sold the land: *Held*, that the deed having originally been a mortgage did not cease to be such on the surrender of the agreement; and that the deed not having been properly recorded, the subsequent grantees could not claim priority over a mortgage duly recorded, which the first grantor had given after conveying as above stated. *Ib*..... 150
4. *Recording acts of 1827.* The act of April 12, 1827, entitled “an act concerning mortgages,” prescribes the manner in which mortgages may be registered, and, being an act expressly in relation to mortgages, and general in its terms, is not controlled in relation to the record of mortgages by the act of the same date, entitled “an act concerning deeds and conveyances;” and a compliance with the first mentioned act in the record of a mortgage is sufficient. *Weed v. Lyon*..... 363

REDEMPTION.

See MORTGAGE, 10, 11.

REMEDY AT LAW.

See FRAUD; JURISDICTION.

RESTRAINT UPON ALIENATION.

See WILL.

SERVICE.

See ATTACHMENT FOR CONTEMPT.

SET OFF.

See MORTGAGE, 7.

SOLICITOR.

See ATTORNEY AND COUNSELOR; PRACTICE, 22 to 25.

SPECIFIC PERFORMANCE.

1. *Of parol contract: What will take case out of statute of frauds.* Specific performance will be decreed of a parol contract for the conveyance of lands where the vendor has received a considerable portion of the purchase money, caused the land to be surveyed, put the vendee in possession, and allowed him to retain such possession and make valuable improvements, in reliance on the contract, for a series of years; these acts of part performance being sufficient to take the case out of statute of frauds. *Bomier v. Caldwell*..... 67
2. Where under a parol agreement to convey land the purchase money had been paid, possession taken and valuable improvements made, these acts of part performance were held to be sufficient to take the case out of the statute of frauds, and to entitle the purchaser to a decree for specific performance. *Burtch v. Hogge* 31
3. Part performance, to take a parol contract for the purchase of lands out of the statute of frauds, should be of unequivocal acts that confirm the existence of the contract. *Millerd v. Ramsdell*..... 373
4. If a party sets up part performance to take a case out of the statute of frauds, he must show acts unequivocally referring to and resulting from that agreement, such as the party would not have done unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed—there must be no uncertainty or equivocation in the case. *McMurtrie v. Bennette*, 124
5. *On what grounds performance of parol contracts decreed.* The ground of the interference of courts of equity to enforce specific performance, is not simply that there is proof of the existence of a parol agreement, but that there is fraud in resisting the completion of an agreement partly performed. *Ib* 124
6. *Part payment of purchase price not enough.* Part payment of the purchase price is not, of itself, sufficient to warrant a decree for the specific performance of a parol contract for the purchase of lands; but it seems that full payment would be. *Ib*..... 124
7. *Specific performance discretionary.* Courts of equity do not, as a matter of course, decree specific performance of contracts for the conveyance of lands, but they exercise a discretionary power in view of all the facts of the case; and their discretion must not be arbitrary and capricious, but regulated on grounds that will render it judicial. *Ib*..... 124
8. *Contracts must be mutual.* The contract sought to be enforced must be mutual, and the tie reciprocal, or a court of equity will not enforce a performance. *Ib. Hawley v. Sheldon*..... 420
9. *Contract must be certain.* A parol contract will not be enforced unless it is certain in all its essential particulars. *McMurtrie v. Bennette*, 124. *Millerd v. Ramsdell*..... 873

10. *Rights of assignee.* Courts of equity recognize and protect the rights of assignees, and enforce the performance of contracts in their favor. *Street v. Dow*..... 427
11. *Effect of inadequate price.* Inadequacy of price, where it is so gross and palpable as of itself to appear evidence of actual fraud, may be sufficient to induce the court to stay the exercise of its discretionary power to enforce a specific performance, and leave a party to his remedy at law; but inadequacy of price *merely*, without being such as to prove fraud conclusively, is not a good objection to specific performance. *Burich v. Hogge*..... 30

See JURISDICTION, 7, 8.

STATUTES.

Construction of. Where one part of an act is equivocal, other portions of the act may be resorted to as a guide in construction. The occasion and the reason of the enactment, which is the same thing as the old law and the mischief; the letter of the act, whether words be used in their proper or in a technical sense; the context, the spirit of the act, whether statutes be in their nature remedial or penal; the subject matter and the provisions of the act, and the intent of the legislature in passing it, are to be considered; which intent is not to be collected from any particular expression, but from a general view of the whole of the act. *Attorney-General v. Bank of Michigan*..... 315

STAY OF PROCEEDINGS.

See DISCOVERY; INJUNCTION, 8.

SUBPÆNA.

See PRACTICE, 1, 2.

TAX TITLES.

1. *Tax paid.* A sale of lands for taxes is wholly unwarranted if the tax has been paid, and the deed given thereon will convey no title to the purchaser. *Rowland v. Doty*..... 3
2. *Evidence of payment.* The collector's return that the tax has not been paid is such evidence *only* of non-payment as will justify the treasurer in selling; and under the code of 1827 the treasurer's deed was evidence only that the sale made by him was *regular* according to the provisions of the statute. The land owner might go behind both, and show that in fact the tax had been paid before the return was made. *Id.*..... 3

TIME.

1. *Statutory condition, when to be performed.* Where no time is prescribed in which an act is to be done, it must be done in a reasonable time. *Attorney-General v. Bank of Michigan*..... 315

TITLE TO LANDS.

See QUIETING TITLES.

TOWN PLATS.

1. *Dedication.* Where the proprietors of a village plat have made a plan by which they have dedicated land for streets, or for a public square, and have sold lots in reference to such plan, they cannot afterwards resume and exercise acts of ownership over the land thus dedicated, which will deprive their grantees of any privileges or advantages which they might derive from having the streets or square kept open. *Sinclair v. Comstock*, 404
2. But in every such case the intention to appropriate the land for the purpose claimed must be clearly apparent. *Ib.*..... 404
3. *Dedication: Refusal to accept.* Where a lot was marked on a town plan as "Court House Square," the purpose being to donate it to the county for the erection of a court house and jail thereon, and the county erected these buildings on another lot, it was *held*, that this constituted sufficient evidence of the refusal of the county to accept the donation, and the proprietors were at liberty to appropriate it to other purposes. *Ib.*..... 404
4. After such refusal, the purchasers of other lots on the plat have no right to insist that such lot shall be kept open as public grounds. *Ib.*..... 404

TRUSTS.

1. *Implied.* To raise a trust by implication there must be an actual payment of money. *Wright v. King*..... 12
2. *Under statute of frauds.* To make an express trust valid under the statute of frauds, the terms and conditions of the trust must be in writing, under the hand of the party to be charged. *Ib.*..... 12
3. *Resulting.* Where two persons claim equities in land, and one of them presents a claim which is allowed by the government land board, there is no resulting trust in favor of the other which can be enforced in equity. *Bernard v. Bougard*..... 130
4. *Bill to enforce a trust: Parties.* To a bill to enforce a trust, it is not necessary to join as defendants parties having a prior interest subject to which the conveyance to the trustee was made. *Suydam v. Dequindre*..... 347
5. The trust being under a general assignment for the benefit of creditors, some of the creditors filed a bill to have the assignment set aside as fraudulent, or, in case it was sustained, then to have the trust enforced. The bill

- averred that certain other creditors had been paid their demands in full. *Held*, not necessary to make such persons parties to the bill. *Ib.*..... 347
6. One of the creditors who had not been paid was made a defendant instead of complainant. *Held*, that as complete justice could be done between the parties on this bill, the fact of his not being made complainant was not good cause of demurrer. *Ib.*..... 347
7. The fact that a time is limited in the assignment for the closing of the trust, will not preclude the filing of the bill before that time has expired, where the bill alleges that the assignee has done nothing in the execution of the trust. *Ib.*..... 347
8. *Trust: Receiver as against trustee.* One to whom a debtor has conveyed his property to keep it beyond the reach of his creditors will be held to be a trustee for their benefit, and will be liable for all the property in his hands when suit is brought against him. But a receiver will not be appointed over one charged with being such a trustee, when there is no allegation that he is insolvent, transient or irresponsible, or that the fund is in a hazardous condition. *Thayer v. Swift*..... 430
- See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; BANKS AND BANKING, 1 to 6. PARTIES.

VENDOR AND PURCHASER.

See LIEN.

WAIVER.

See MORTGAGE, 8. PRACTICE, 20.

WAYS.

1. *Lot owners in Detroit, rights of, in streets.* Purchasers of lots in the city of Detroit acquire no other or greater rights from the fact that said city was laid out by the governor and judges of the late Territory of Michigan, under an act of Congress authorizing them so to do, than they would acquire if the same had been laid out by an individual who had legally dedicated certain portions for streets and alleys. *Cooper v. Alden*..... 72
2. *Rights of lot owners in streets: Power of city to lease street.* Purchasers of lots bounded on a street or square acquire a right to have such street or square preserved and appropriated to the uses for which it was dedicated, and the city, in the absence of any express authority, has no power to lease any portion of such street or square, to be used for a purpose destructive of the ends for which it was originally dedicated. *Ib.*..... 73
3. *Commissioners of internal improvement, power of, to appropriate streets.* The commissioners of internal improvement have no right, under the general powers conferred on them, to appropriate a portion of a street in the city of Detroit for the purpose of erecting offices and other buildings thereon. *Ib.*..... 72